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EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS

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David E. Risley (Illinois, Central District), received a Certificate of Appreciation from Raymond L. Vinsik, Special Agent in Charge, Drug Enforcement Administration, Chicago, for his outstanding contributions in the field of drug law enforcement. Also, from Jeremy D. Margolis, Director, Illinois State Police, for his assistance at the "Operation Valkyrie" Tactical Training/Instructor Development Seminar.

J. William Roberts, United States Attorney, Central District of Illinois, received a Certificate of Appreciation from Raymond L. Vinsik, Special Agent in Charge, Drug Enforcement Adinistration, Chicago, for outstanding contributions in the field of drug law enforcement.

Julie Robinson (District of Kansas), by Tom Dailey, Chief of Police, Kansas City, for her excellent legal skills and expertise in the trial of a drug trafficking case.

Frederick Stephens (District of Colorado), by Robert L. Pence, Special Agent in Charge, FBI, Denver, for his legal guidance and support in the arrest and convictions of five subjects, plus seizure of 200 pounds of marijuana.

Janice V. Terbush (Michigan, Eastern District), received a Certificate of Appreciation from Bernard H. La Forest, Special Agent in Charge, Bureau of Alcohol, Tobacco and Firearms, Detroit, for her outstanding efforts in obtaining convictions while protecting an informant in a firearms and narcotics case.

James B. Tucker and **James K. McDaniel** (Mississippi, Southern District), by Wayne Taylor, Special Agent in Charge, FBI, Jackson, for their successful criminal prosecution of a public service official.

Paul J. Van de Graaf (Pennsylvania, Eastern District) by Paul A. Adams, Inspector General, Department of Housing and Urban Development, Washington, D.C., for his success in prosecuting an FHA mortgage insurance program fraud case, one of the first to utilize the RICO statute.

Jeffery M. Whitt (Pennsylvania, Eastern District), by Ernest Kun, Special Agent in Charge, U.S. Secret Service, Philadelphia, for his legal skill and expertise in a complicated fraud case.

Randall E. Yontz (Ohio, Southern District), by Timothy J. Mahoney, Office of the Regional Chief Inspector, U.S. Postal Service, Bala-Cynwyd, Pennsylvania, for his assistance in the preparation of a criminal case for trial, leading to final settlement negotiations.

* * * * *

PERSONNEL

On December 29, 1989, **Gene W. Shepard** was sworn in as United States Attorney for the Southern District of Iowa.

On December 31, 1989, **Lorraine I. Gallinger** was appointed Interim United States Attorney for the District of Montana.

* * * * *

ORGANIZED CRIME STRIKE FORCES

Reorganization

On December 26, 1989, a letter from Attorney General Dick Thornburgh announcing the Organized Crime Strike Force reorganization was delivered to the Honorable Joseph R. Biden, Jr., Chairman, Committee on the Judiciary, United States Senate, and other interested Members.

A copy of this letter is attached at the Appendix of this Bulletin as Exhibit A. See United States Attorneys' Bulletin, Vol. 38, No. 1, p. 4, dated January 15, 1990, for a copy of the implementation order.

* * * * *

DRUG ISSUES

Anti-Drug Abuse Act Of 1988

The Anti-Drug Abuse Act of 1988 contains a provision codified at 18 U.S.C. §1516, making it a crime to obstruct a federal audit. This statute provides federal auditors with the same protection from obstruction that investigators, administrative proceedings, and the grand jury currently enjoy.

In response to a number of inquiries from Assistant United States Attorneys and from administrative agencies, Theodore S. Greenberg, Acting Chief of the Fraud Section, Criminal Division, has prepared an analysis of the obstruction of audit statute. A copy is attached at the Appendix of this Bulletin as Exhibit B.

Additional questions relating to the attached analysis or generally to the obstruction of audit statute may be addressed to Barbara A. Corprew, Chief, Defense Procurement Fraud Unit, at FTS/202-786-4600.

* * * * *

Manuel Antonio Noriega

On January 4, 1990, Attorney General Dick Thornburgh issued the following statement with regard to the apprehension of Manuel Antonio Noriega:

> The indictments against Noriega detail how he played a key role in the international narcotics trade. They charge that he used his official positions in Panama to facilitate illegal drug trafficking and money laundering activities of the Medellin cocaine Cartel through Panama. His appearance in a court of law to answer these charges is long overdue.
>
> The capture of Noriega along with the demise last month of Colombian drug kingpin Rodriguez Gacha is a one-two punch against the international drug traffickers and illustrates their ultimate vulnerability to cooperative international efforts. These drug lords are not invincible and we are now proving it.
>
> Noriega has been named in two indictments, one issued by a federal grand jury in Miami, and a second issued by a federal grand jury in Tampa. The Miami indictment, which Noriega will face first, charges that between 1982 and 1986, Noriega and 15 other defendants participated in a variety of illegal drug trafficking activities that involved cocaine smuggling from Colombia to the United States.
>
> In particular, the Miami indictment alleges that Noriega participated in a scheme to facilitate the smuggling of cocaine destined for U.S. markets out of Colombia by air on behalf of members of the Medellin Cartel, including Pablo Escobar and the Ochoa brothers; interfered with a Panamanian investigation of an attempt by his associates to smuggle 1200 kilos of cocaine to Miami; requested and received payments totaling $4 million from the Medellin Cartel in exchange for his promise to protect a cocaine laboratory in Darien Province, Panama; and participated in a scheme to smuggle cocaine to the United States using a yacht that had been seized by the Panamanian Defense Forces.
>
> The Tampa indictment charges that between 1982 and 1984, Noriega and a Panamanian associate, Enrique Pretelt, conspired to import and distribute more than a million pounds of marijuana into the United States.

The indictments allege that Noriega received nearly $10 million in connection with drug trafficking activities. If found guilty on all counts, he could be sentenced up to 165 years on the Miami indictment and up to 45 years on the Tampa indictment.

Copies of these indictments are available by calling Judy Beeman, Editor, or Audrey Williams, Assistant Editor, United States Attorneys' Bulletin, at FTS/202-272-5898.

* * * * *

Anti-Drug Funds Awarded To The State Of California

On December 29, 1989, Attorney General Dick Thornburgh announced a nearly four-fold increase, to $39.7 million, in federal anti-drug funds to be provided to California for state and local drug law enforcement and for other anti-drug abuse programs. Increased federal support for state and local efforts, many of them conducted in cooperation with federal law enforcement, was proposed by President Bush last fall in his National Drug Control Strategy and was approved by the Congress last month.

California is the first state to receive FY 1990 funds. Its $39,676,000 grant is almost $30 million more than its grant of $10.8 million. Under the California plan, 64.37 percent of the grant will be distributed to local communities. The funds will enable the state to continue supporting 36 projects throughout California involving numerous types of anti-drug enforcement activities, including multijurisdictional investigative task forces and specialized prosecution initiatives. In addition, a portion of the grant will be distributed to all counties in the state, based on a formula that analyzes population and crime severity data from the state's Crime Index Reporting System.

The Bureau of Justice Assistance, a part of the Department of Justice's Office of Justice Programs, is currently receiving and reviewing grant applications from the other states. The Congress has appropriated $395 million for these grants.

* * * * *

SENTENCING GUIDELINES

Sentencing Guideline Section 4B1.1 And 18 U.S.C. §922(G)

On January 5, 1990, Joe B. Brown, Chairman, Sentencing Guidelines Subcommittee of the Attorney General's Advisory Committee, advised all United States Attorneys that he had received several questions concerning whether 18 U.S.C. §922(G) should be considered a crime of violence for the purpose of career offender status under Guideline Section 4B1.1 or enhanced sentencing under 18 U.S.C. §924(C). In November, 1989, a telex was sent out stating that he thought the answer to this question was "No." The following is a further clarification of the November, 1989 telex that appeared in the United States Attorneys' Bulletin, Vol. 37, No. 12, dated December 15, 1989.

There have been several cases on appeal concerning this issue and the Third Circuit has issued an opinion, United States v. Williams, No. 89-3093 (decided December 26, 1989). In the Williams case, the defendant was sentenced under the Guidelines in existence prior to November 1, 1989. He was convicted under 18 U.S.C. §922(G) (convicted felon in possession of a firearm). The facts of the case showed that during the course of the possession he had fired the weapon at one person and threatened to kill another. He had the requisite number of convictions to qualify him for enhanced punishment under Section 924(C) and career offender status under Guideline Section 4B1.1. The issue before the Third Circuit was whether the crime of conviction, 18 U.S.C. §922(G), constituted a "crime of violence." The Third Circuit, using the examples contained in the Guidelines as they existed prior to November 1, 1989, concluded that the facts of the possession showed that this was a crime of violence since it involved the actual violence. The Third Circuit stated that possession without firing the weapon, etc. would not be a crime of violence. The defendant was subsequently sentenced to 360 months as a career offender.

The Third Circuit did not address the new definition under Section 4B1.2 of the Guidelines. In the new amendment, the examples relied upon by the Third Circuit are deleted. However, in view of the Third Circuit opinion, you may want to consider, in a case where the possession does in fact have clear cut violence, arguing that it can be used to trigger career offender status under Guideline Section 4B1.1 or may be used to trigger the 15-year provisions of 18 U.S.C. §924(E)(1). It should be noted that Congress has a slightly different definition of violent felony in 18 U.S.C. §924(E)(2)(B) than it does under Section 924(C)(3). It appears to be a much more difficult question to try to argue that Section 924(C) is triggered by a Section 922(G) conviction.

* * * * *

Presentence Investigation Report

Effective December 1, 1989, Rule 32 of the Federal Rules of Criminal Procedure was amended to allow federal criminal prosecutors to retain a copy of the Presentence Investigation Report. Former Rule 32(C)(3)(E), which required that all copies of the Presentence Investigation Report be returned to the probation officer, was abrogated by the amendment to Rule 32.

A memorandum concerning this report issued by Acting Associate Director Laurence E. Fann, Financial Litigation Staff, Executive Office for United States Attorneys, was reprinted in the United States Attorneys' Bulletin, Vol. 37, No. 12, p. 387, dated December 15, 1989. Please be advised that in the paragraph concerning Section E of the Presentence Investigation Report, "Executive Office for United States Attorneys" was incorrectly added after Financial Litigation Unit. The Presentence Investigation Report should be transmitted to the Financial Litigation Unit.

If you have any questions, please contact Nancy Rider, Attorney-Advisor of the Financial Litigation Staff, at FTS/202-272-4017.

* * * * *

Guideline Sentencing Updates

A copy of the "Guideline Sentencing Update," Volume 2, Number 17, dated December 6, 1989, Volume 2, Number 18, dated December 29, 1989, and Volume 2, No. 19, dated January 12, 1990, is attached at the Appendix of this Bulletin as Exhibit C.

* * * * *

POINTS TO REMEMBER

Asset Forfeiture

On January 11, 1990, Cary H. Copeland, Director, Executive Office for Asset Forfeiture, issued a memorandum to United States Attorneys and Department of Justice officials, concerning the seizure of forfeitable property. The memorandum discusses Pre-Seizure Judicial Review and the forms of process to be used, and is attached at the Appendix of this Bulletin as Exhibit D.

* * * * *

Felon Identification In Firearms Sales

On November 20, 1989, Attorney General Dick Thornburgh sent a letter to the Honorable Dan Quayle, Vice President of the United States and President of the United States Senate, and others, concerning systems available for the "immediate and accurate" identification of felons who attempt to purchase firearms.

An incomplete copy of this letter was attached at the Appendix of the United States Attorneys' Bulletin, Vol. 37, No. 12, dated December 15, 1989, and is being reprinted as Exhibit E at the Appendix of this Bulletin.

* * * * *

Unauthorized Disclosure Of Information

On December 29, 1989, Attorney General Dick Thornburgh forwarded a letter to the Honorable Joseph R. Biden, Jr., Chairman of the Senate Judiciary Committee, regarding the results of and the methodology utilized in the Department's investigation of unauthorized disclosures of information which led a news reporter to air a story involving Representative William H. Gray, III.

A copy of that letter is attached at the Appendix of this Bulletin as Exhibit F.

* * * * *

Expert Testimony Regarding Polygraph Examinations

Lawrence Lippe, Chief, General Litigation and Legal Advice Section, Criminal Division, (FTS/202-786-4806), has prepared a memorandum concerning the use of expert testimony regarding polygraph examinations.

The Department's current policy is to oppose all attempts by defense counsel to admit polygraph evidence or to have an examiner appointed by the court to conduct a polygraph test. Moreover, the policy provides that government attorneys should refrain from seeking the admission of favorable examinations which may have been conducted during the investigatory stage. Essentially, it is the Department's position that the courts have been justified in excluding polygraph evidence from the jury's consideration, and that such examinations should be used only for investigative purposes. (USAM 9-13.310 et seq.).

In United States v. Piccinonna, 885 F.2d 1529 (11th Cir. 1989), en banc, the majority asserted that "tremendous advances have been made in polygraph instrumentation and techniques," and, therefore, the Frye general acceptance test should not act as a bar to admission of polygraph evidence as a matter of law. Accordingly, the court rejected the per se exclusionary rule and fashioned a rule "more in keeping with the progress made in the polygraph field." The court went on to outline two instances where polygraph evidence may be admitted at trial:

> (1) Polygraph expert testimony will be admitted when both parties stipulate in advance as to the circumstances of the test and as to the scope of its admissibility.
>
> (2) Polygraph evidence may be used to impeach or corroborate the testimony of a witness at trial subject to three preliminary conditions:
>
> - the party planning to use the evidence at trial must give adequate notice to the opposing party.
>
> - the evidence will be admissible only if the opposing party was given reasonable opportunity to conduct its own polygraph exam covering substantially the same questions.
>
> - A polygraph examiner's testimony will be governed by the Federal Rules of Evidence for the admissibility of corroboration or impeachment testimony.

The Solicitor General's office has decided not to seek certiorari in Piccinonna.

As far as we know, the government has never sought to introduce unstipulated polygraph evidence to establish the substantive correctness of the results of a polygraph exam. Over the years, however, the government has taken the position that if a defendant intends to contest the voluntariness or reliability of a confession or admission, then very limited polygraph evidence may be admitted solely for the purpose of explaining the sequence of events that led to the confession or admission. See e.g. United States v. Miller, 874 F.2d 1255 (9th Cir. 1989); United States v. Kampiles, 609 F.2d 1233 (7th Cir. 1979), cert. denied 446 U.S. 954 (1980); Tyler v. United States, 193 F.2d 24 (D.C. Cir. 1951), cert. denied, 343 U.S. 908 (1952).

To the extent that Piccinonna permits introduction of unstipulated polygraph evidence for purposes of impeachment or corroboration, it conflicts with the views of other circuits, particularly the Ninth Circuit which continues to have a "uniformly 'inhospitable' view towards the admission of unstipulated polygraph evidence " Miller, supra, at 1261.

According to a representative of the FBI's polygraph unit, it continues to be the Bureau's position that polygraph exams are to be used only for investigative purposes. Moreover, the FBI representative asserted that there have been no major developments in polygraph instrumentation or techniques since the late 1970's.

In our view, the Court's decision in Piccinonna is premised on the questionable assumptions that tremendous advances have been made in polygraph technology and that the technology has achieved general acceptance in the scientific community. We believe a more accurate assessment of the state of the art was articulated by Circuit Judge Johnson in his dissent in Piccinonna:

> The scientific community remains sharply divided over the issue of the validity of polygraph exams. Although presented as a rigorously "scientific" procedure, the polygraph test in fact relies upon a highly subjective, inexact correlation of physiological factors having only a debatable relationship to dishonesty as such. The device detects lies at a rate only somewhat better than chance. 885 F.2d at 1542.

For the foregoing reasons, we have concluded that the Court's decision in Piccinonna does not warrant a change in the Department's policy concerning the use of polygraph evidence.

* * * * *

Savings And Loan Fraud

On December 7, 1989, Attorney General Dick Thornburgh announced plans for "a 27-city attack on savings and loan fraud" through the deployment of more than 400 additional federal prosecutors, FBI investigators, and accounting personnel. The Attorney General stated, "Wrongdoing in the savings and loan industry may turn out to be the biggest white-collar swindle in the history of our nation. It poses an enormous and unprecedented challenge to the Department of Justice. Because of President Bush's

leadership in winning passage of his savings and loan bill and the financial support provided by Congress, we are now ready to implement a plan to crack down on those responsible."

Congress recently funded the President's savings and loan bill which allocates to the Department of Justice $48.5 million to help clean up the industry. The Attorney General pointed out that current efforts at savings and loans prosecutions have primarily been focused through the Dallas Bank Fraud Task Force, which has brought criminal charges against 57 defendants, with 476 convictions so far, only two acquittals and over $10 million ordered in restitutions. Convictions have included bank chairmen, presidents and vice-presidents. As a result of the additional fundings, resources assigned to the Dallas office will be doubled and additional resources will be directed at conducting a "truly comprehensive nationwide investigation."

The Attorney General's plan targets 26 other cities for Department Task Force investigations with substantial resources going to priority areas of Dallas, Houston, Kansas City, Los Angeles, New Orleans, New York and San Antonio. A total of 202 FBI agents and 148 prosecutors will be involved in the nationwide effort, and will be "on the job and on the trail" early in the new year. Thirty attorneys will also be added to the Tax and Criminal Divisions in Washington, D.C. to assist in the investigations. Six Assistant United States Attorneys will be kept in reserve for field assistance. Over 59 FBI agents have already been assigned to cities with a high concentration of savings and loan fraud cases. In addition, 100 FBI accounting technicians will be assigned to FBI field offices and 20 accountants will be assigned to United States Attorneys.

Attached at the Appendix of this Bulletin as Exhibit G is a copy of the targeted areas with their allocated resources for savings and loans investigations.

* * * * *

LEGISLATION

Americans With Disabilities Act

The House Judiciary Subcommittee on Civil and Constitutional Rights is expected to mark up S. 933, the Americans with Disabilities Act, as passed by the Senate, early in the new session. It is not clear that the Subcommittee will adopt significant amendments, but they may write report language to clarify existing provisions of the legislation.

* * * * *

Administrative Dispute Resolution Act

The Subcommittee on Administrative Law and Governmental Relations of the House Judiciary Committee has rescheduled its hearing regarding H.R. 2497, the Administrative Dispute Resolution Act for January 31, 1990. A previously scheduled hearing (November 29th) was cancelled. Assistant Attorney General William Barr, Office of Legal Counsel, will testify, as was planned in November.

* * * * *

Environmental Crimes Act

H.R., 3641, the Environmental Crimes Act, was introduced at the end of the last session and would create three new criminal offenses relating to violations of other federal environmental statutes which also result in harm to individuals or the environment. Enforcement under the proposed bill would fall to the Land and Natural Resources Division. As reported earlier, Deputy Assistant Attorney General George Van Cleve of the Land and Natural Resources Division testified on December 12, 1989 before the Criminal Justice Subcommittee of the House Judiciary Committee regarding the Department's concerns with the bill. Subsequently, questions regarding which committees should have jurisdiction over the bill and how quickly the bill should move have arisen. At least two other committees, Energy and Commerce and Public Works, have expressed an interest in conducting hearings on the bill.

* * * * *

Federal Tort Claims Act

The Senate Judiciary Subcommittee on Courts and Administrative Practice is expected to hold a hearing on S. 464, a bill to limit the discretionary function exception to the Federal Tort Claims Act. The bill currently has fifteen co-sponsors. Justice Department personnel have conferred with committee staff to make sure they know of the Department's fundamental objections to the legislation. The House Judiciary Subcommittee on Administrative Law and Governmental Relations held a hearing on the House version on November 1, 1989 and further action is expected during this session.

* * * * *

Home Heating Oil

A significant number of calls have been received from Members of Congress, state legislators, governors, and private citizens, regarding the recent dramatic increases in the prices of home heating oil, propane and diesel fuel. James Rill, Assistant Attorney General, Antitrust Division, testified before the Senate Governmental Affairs Committee regarding the Department's efforts to determine if evidence exists to indicate that recent home heating oil price increases resulted from collusion regarding price or supply. Representatives of the Department of Energy, the Maritime Administration, and the Customs Service also testified. Government testimony was followed by four other panels of consumers, consumer advocates, and state officials.

* * * * *

CASE NOTES

CIVIL DIVISION

D.C. Circuit Orders Plaintiff To Post A Bond In A Realistic Amount To Obtain A Preliminary Injunction

The district court granted a preliminary injunction preventing the Department of Health and Human Services from reducing the Part B Medicare payments to a kidney dialysis supplier. We moved the district court to require plaintiff to post a substantial bond and submitted affidavits showing that the injunction would cost Medicare $1.5 million per month. The district court, however, required only a $1,000 bond. We appealed, arguing both that the injunction had been improperly entered and that the district court had abused its discretion in requiring only a nominal bond. Four days after argument, the D.C. Circuit remanded the record, instructing the district court to order a bond sufficient to provide "realistic protection against a risk that the District Court or this Court might conclude that the preliminary injunction was improvidently issued." Accepting our position, the court of appeals held, "The bond * * * must be in an amount sufficient to protect the adversary from loss in the event that future proceedings prove that the injunction issued wrongfully."

National Kidney Patients Ass'n v. Sullivan,
Nos. 89-5039 & 89-5040 (December 8, 1989).
DJ # 137-16-1333

Attorneys: Anthony J. Steinmeyer, FTS/202-633-3388
Jeffrica Lee, FTS/202-633-3469

* * * * *

First Circuit Reverses District Court's Equal Access To Justice Act (EAJA) Fee Award In Visa Denial Case

The underlying action to this fee case arose as a challenge to the denial of a non-immigrant visa to Hortensia de Allende, who was invited by various United States citizens to speak on several subjects during a lecture tour in this country. The government's denial was based on the exclusionary provisions of 8 U.S.C. 1182(a)(27), which, in the government's view, requires denial of visa applications even when an alien's mere presence in this country, as distinguished from activities to be engaged in upon arrival, would be prejudicial to the public interest.

The court of appeals ultimately rejected the government's position on the merits, following the Supreme Court's affirmance of the parallel D.C. Circuit Abourezk judgment by an equally divided court, as well as new legislation designed to provide First Amendment-type protections to aliens seeking entry to this country. Plaintiffs then sought attorneys' fees under EAJA, and the district court entered an award of $142,000, holding that the government's position on the merits was not substantially justified. The court of appeals has now reversed this ruling as an abuse of discretion, since the case presented questions of first impression, the government's view was at least reasonable (even if not correct), and other jurists--including three members of the Supreme Court--had found the government's view persuasive.

Allende v. Baker, No. 89-1360 (December 5, 1989). DJ # 39-34-36.

Attorney: Michael Jay Singer, FTS/202-633-5425

* * * * *

First Circuit Vacates As Premature A Permanent Injunction Requiring The Food And Drug Administration To Comply With Notice-And-Comment Procedures Before Refusing Import Of Garlic

After sampling 30 bulbs of Spanish raw, purple garlic from a million-bulb shipment offered for import to Puerto Rico, and finding mold and decomposition in some of the cloves, the Food and Drug Administration (FDA) refused admission of the garlic. The consignee sued, challenging FDA's regulatory authority in this area and the validity of the sampling procedures. After a

limited preliminary injunction hearing, the district court dismissed the case. However, when the consignee moved for reconsideration on the additional ground that FDA's procedures for inspecting and rejecting garlic should be subject to APA notice-and-comment procedures, the district court issued a permanent injunction to that effect. The First Circuit has vacated the injunction, accepting our procedural argument that a district court cannot issue a permanent injunction at the preliminary injunction stage unless it gives the parties clear notice that it is consolidating the two proceedings. In remanding the case, the court also issued guidance (mostly favorable) on the notice-and-comment issue itself.

Caribbean Produce Exchange, Inc. v. Sec'y of Health & Human Services, No. 89-1257 (December 28, 1989). DJ # 21-65-36

Attorneys: Michael Jay Singer, FTS/202-633-5432
Barbara C. Biddle, FTS/202-633-3380

* * * * *

Second Circuit Holds That Government's Decision To Use Asbestos In Ships During World War II And Not To Warn Of Dangers Is A Protected Discretionary Function

This was a suit to recover tort damages for asbestos exposure on U.S. merchant ships in World War II. The decedent was a seaman aboard the ship who allegedly was injured by asbestos. We argued that the use of asbestos on the ships was a discretionary function and thus not actionable in tort. As a preliminary matter, we also argued that the Suits in Admiralty Act, which gives seamen a cause of action in admiralty against the government, incorporates the discretionary function exception, although the statute is silent on the point.

The Second Circuit has now agreed with us, holding that the exception is founded upon the separation of powers, and that explicit statutory reference is therefore not required. The court also held that the use of asbestos in wartime is protected by the discretionary function exception. In so holding, the court rejected the theory adopted by the First Circuit, that application of the exception requires an actual exercise of discretion, i.e., that the government must have actually considered the problem and weighed the relevant factors. The court accordingly rejected as irrelevant the plaintiff's argument that the government should have warned the seaman of the danger and had never even considered whether or not to do so.

In Re Joint Eastern and Southern Districts Asbestos Litigation, In the Matter of Sally Robinson v. United States, et al., No. 89-6109. DJ # 61-51-6628

Attorney: Robert S. Greenspan, FTS/202-633-5428

* * * * *

Seventh Circuit Holds That The Attorney General Has No Mandatory Duty To Issue Regulations Establishing Substantive Criteria For Approval Of International Prisoner Transfer Requests

In this mandamus action, the plaintiffs (two American citizens convicted in the United Kingdom of the theft of jewels valued at $3.6 million and currently serving prison sentences in the U.K.) sought an order compelling the Attorney General to issue substantive regulations governing the exercise of his discretion under 18 U.S.C. §4100 et seq. to request transfer to American prisons of American citizens imprisoned abroad. The statute implements an international treaty governing such prisoner transfers.

The district court held that 18 U.S.C. §4102, which "authorize[s]" the Attorney General to promulgate regulations implementing the treaty, creates a mandatory duty for the Attorney General to issue substantive criteria governing consideration of transfer requests. The court also found that the Attorney General abused his discretion in denying plaintiffs' transfer requests and that he deprived them of due process. The court ordered the Attorney General to issue regulatory criteria and to reconsider plaintiffs' transfer requests under those criteria, according them specific procedural safeguards. We argued on appeal (1) that the Attorney General has no mandatory duty to issue substantive regulations governing prisoner transfer decisions, (2) that his decision not to seek plaintiffs' transfer is not subject to judicial review, and (3) that plaintiffs have no liberty interest entitling them to due process in the Attorney General's consideration of their transfer requests. The Seventh Circuit has now adopted all of our arguments and has reversed the district court's decision.

Scalise, et al. v. Thornburgh, et al., No. 88-2497 (December 19, 1989). DJ # 145-12-7927

Attorneys: Barbara L. Herwig, FTS/202-633-5425
Irene M. Solet, FTS/202-633-3355

* * * * *

Eighth Circuit Holds That A National Guardsman's Claim For Reinstatement Is Nonjusticiable

Sergeant Lovell brought this action against the Nebraska National Guard and its officials, as well as the Federal Army National Guard Bureau, claiming that his removal as a recruiter violated the First Amendment. Lovell asserted that he had been removed in retaliation for his testimony before the Nebraska legislature against the confirmation of the National Guard's adjutant general.

The Eighth Circuit has now extended Chappell v. Wallace, 462 U.S. 296 (1983), and Feres v. United States, 340 U.S. 135 (1950), which barred servicemen's claims for damages against the military, to claims which would involve the same "highly intrusive judicial inquiry into [military] personnel decisions" involved in damage claims. The court noted that the Board for the Correction of Military Records provides an avenue for administrative review.

Thomas R. Lovell III v. Stanley M. Heng,
Nos. 89-1492, 89-1591 (November 17, 1989).
DJ # 145-4-4883

Attorney: Anthony J. Steinmeyer, FTS/202-633-3388

* * * * *

Ninth Circuit Affirms $5 Million Medical Malpractice Award In Alaska Meningitis Case

In the midst of a serious flu epidemic, an Alaska native mother brought her young child to a United States Public Health Service (PHS) hospital because of the child's high temperature and lethargy. The doctor on duty gave the child some Tylenol and told the mother to bring him back the next morning if he had not improved. The next morning the child was semi-comatose. It turned out that the child had not been suffering from the flu, but from meningitis. The child is now severely physically and mentally handicapped. The district court found the government liable for the child's condition and awarded over $5 million in damages. We appealed on liability and damages.

The Ninth Circuit rejected all of our arguments. We suggested that the court was wrong to reject our medical experts' testimony that the PHS doctor's error in diagnosis was understandable and excusable. We pointed out that the only plaintiff's expert on this point was a highly unorthodox pediatrician

who had written the book, How To Raise A Healthy Child. . .In Spite Of Your Doctor. The court held that plaintiff's expert was "coherent" and "facially plausible," and that his testimony was sufficient to uphold the liability determination. Next, we suggested that the damages were too high. We argued that the court should have set off some of the award for lost income against the award for future residential care (each of which was for over $1 million). The panel disagreed, permitting both awards to stand.

Yako v. United States, No. 88-4034
(December 11, 1989) DJ # 157-6-620

Attorneys: Robert S. Greenspan, FTS/202-633-5428
William Cole, FTS/202-633-5090

* * * * *

Ninth Circuit Rules That Notice Of Appeal Filed On Behalf Of "Defendants" Is Sufficient To Perfect Appeal For All Defendants

Following briefing and argument on the merits of this case --involving the validity of INS regulations regarding employment during the pendency of deportation proceedings--plaintiff-appellees sought to have our appeal dismissed, on the ground that our notice of appeal on behalf of "defendants" was insufficient to bring any of the named defendants before the court of appeals. Although such arguments were plausible in light of the strict rule set down by the Supreme Court in Torres v. Oakland Scavenger Co., 108 S.Ct. 2405 (1988), we argued that there was no real ambiguity here, especially in light of the fact that defendant INS was specifically named in the caption of the notice of appeal and that the action is effectively one for relief against the United States itself.

The court of appeals has now rejected plaintiffs' suggestion. Despite the existence of narrower grounds for such a ruling in this case, the court ruled that the use in a notice of appeal of a generic term, such as "defendants," is sufficient as to all such persons, in the absence of any indications to the contrary.

National Center for Immigrants' Rights v.
INS, No. 88-5774 (December 21, 1989).
DJ # 39-12C-1880

Attorneys: Barbara L. Herwig, FTS/202-633-5425
John F. Daly, FTS/202-633-2541

* * * * *

Tenth Circuit Upholds USDA's Food Stamp Mail Loss Regulations And The Federal Government's Right To Collect Prejudgment Interest From A State

We have successfully defended the validity of USDA's regulations requiring the states to share in the cost of food stamps lost in the mail. The Tenth Circuit panel agreed that the program "is clearly consistent with the program and reasonably related to its purposes." The panel refused to review the application of the regulations to New Mexico's losses, noting that the state's attack was largely based upon materials gathered in district court discovery and not presented to the agency. Of greater general importance, the court ruled favorably on our cross-appeal, holding that the agency could collect prejudgment interest on the state's excess mail loss assessments. The district court, consistent with the unanimous holdings of three other circuits, agreed with the state that the Debt Collection Act, 31 U.S.C. §§3701(c), 3717, barred the imposition of interest when the debtor is a state or local government. The panel reversed in a comprehensive discussion of the statute, its purposes, and its legislative history.

Gallegos v. Lyng, Nos. 88-1367 and 88-1370 (December 15, 1989). DJ # 147-49-40

Attorneys: William Kanter, FTS/202-633-1597
Bruce Forrest, FTS/202-633-2496

* * * * *

TAX DIVISION

Supreme Court Grants Certiorari In Case Involving Tax Exempt Social Clubs

On January 16, 1990, the Supreme Court granted a petition for certiorari filed by the taxpayer in Portland Golf Club v. Commissioner. The Solicitor General had previously acquiesced in this petition. Social clubs, unlike most other tax-exempt organizations, are subject to tax on their investment income. The question presented in this case is whether a tax-exempt social club may deduct losses it suffered in providing food and beverages to nonmembers against its investment income. The Ninth Circuit, agreeing with the Second Circuit's decision in The Brook v. Commissioner, 799 F.2d 833 (2d Cir. 1986), held that such losses were not deductible because the sales to nonmembers were not carried out with an intent to make a profit. This ruling conflicted with the Sixth Circuit's decision in Cleveland Athletic Club, Inc. v. United States, 779 F.2d 1160 (1985).

* * * * *

ADMINISTRATIVE ISSUES

Career Opportunities

Antitrust Division

The Office of Attorney Personnel, Department of Justice, is recruiting attorneys for the Antitrust Division. There may be several positions in each of six field offices (Atlanta, Chicago, Cleveland, Dallas, New York City, and San Francisco) as well as a significant number of positions in Washington, D.C. Most of the positions will be responsible for reviewing mergers and acquisitions and/or conducting investigations and handling litigation (including grand jury proceedings and discovery requests), both civil and criminal. The positions will entail some travel.

Applicants must possess a J.D. degree, be an active member of the Bar in good standing, and have one to five years of legal experience. Applicants must have superior academic and professional qualifications. Experience in antitrust, civil litigation, or white collar crime is strongly preferred. An educational or professional background in economics is also preferred. Applicants should submit three copies of their current SF-171 (Application for Federal Employees) or resume by March 1, 1990, as well as a writing sample to: D. Gainey, Antitrust Division, Rm. 3239, Main Building, U.S. Department of Justice, Washington, D.C. 20530. Current salary and years of experience will determine the appropriate grade and salary levels. The possible range is GS-12 $35,825 - $46,571) to GS-14 ($50,342 - $65,444). (Applicants who responded to the advertisement of December 1, 1989 are already under active consideration and should not re-apply.)

* * * * *

Office of Consumer Litigation, Civil Division

The Office of Attorney Personnel, Department of Justice, is recruiting experienced trial attorneys for its Office of Consumer Litigation, Civil Division, to handle criminal and civil litigation and resulting appellate work. The Office represents the government in criminal proceedings and civil suits instituted against corporations and individuals engaged in violations of the Federal Food, Drug, and Cosmetic Act. Other hazardous and unsafe products, unfair and deceptive advertising practices, odometer tampering, enforcement of administrative orders relating to price

fixing and divestiture, unfair consumer credit and debt collection practices, franchising, and door-to-door and mail order sales. The Office also represents the government in defending against actions challenging federal policies and initiatives that protect the public in its purchases of foods, drugs, devices and other consumer products. The Office's clients include the Food and Drug Administration, Federal Trade Commission and the Consumer Product Safety Commission.

Applicants must possess a J.D. degree, be an active member of the bar in good standing (any jurisdiction), and have at least two years of post-J.D. experience. Applicants should have a strong interest in trial work, an exceptional academic background; a judicial clerkship or comparable experience is highly desirable. Applicants may call on FTS/202-724-6787 and/or submit a resume and writing sample to: John R. Fleder or Margaret A. Cotter, Office of Consumer Litigation, Civil Division, Department of Justice, P.O. Box 386, Washington, D.C. 20044. Current salary and years of experience will determine the appropriate grade and salary levels. The possible range is GS-12 ($35,825 - $46,571) to GS-14 ($50,342 - $65,444). This position will be open until filled.

* * * * *

Fraud Section, Criminal Division

The Office of Attorney Personnel, Department of Justice, is recruiting experienced trial attorneys for the Fraud Section of the Criminal Division to handle criminal cases involving failed thrift institutions throughout the United States. The duty station will be in Washington, D.C., but the cases are nationwide and there will be extensive travel.

Applicants must possess a J.D. degree, be an active member of the bar in good standing (any jurisdiction), and have at least one year of post-J.D. experience. Please submit a current SF-171 (Application for Federal Employment) or resume (no telephone calls, please) to: Donald Foster, Fraud Section, Criminal Division, Department of Justice, P.O. Box 28188, Central Station, Washington, D.C. 20038. Current salary and years of experience will determine the appropriate grade and salary levels. The possible range is GS-12 ($35,825 - $46,571) to GS-15 ($59,216 - $76,982). The position will be open until filled.

* * * * *

Office Of Special Counsel For Immigration Related Unfair Employment Practices

The Office of Attorney Personnel, Department of Justice, is seeking an experienced attorney for the Office of Special Counsel for Immigration Related Unfair Employment Practices. The attorney will be primarily responsible for the investigation and litigation of charges filed with this Office under the antidiscrimination provision of the Immigration Reform and Control Act. Applicants should have a minimum of one year of litigation experience, must possess a J.D. degree and be an active member of the bar in good standing.

Please submit a current SF-171 (Application for Federal Employees) or resume (no telephone calls, please), writing sample, and at least three references familiar with the applicant's accomplishments and abilities to: Office of Special Counsel, P.O. Box 65490, Washington, D.C. 20035-5490, Attn: Gaylord Draper, Executive Officer. Salary is commensurate with experience. The pay scale for Department attorneys ranges from GS-11/1, $29,891 to GS-15/10, $76,9820. This position is open until filled.

* * * * *

U.S. Trustee's Office (Sacramento, Oakland, and San Francisco)

The Office of Attorney Personnel, Department of Justice, is recruiting an attorney to head the U.S. Trustee's Office in Sacramento and Oakland, and to assist with the management of the U.S. Trustee's office in San Francisco. The Assistant U.S. Trustee is responsible for monitoring the legal and financial aspects of cases filed under Chapters 7, 11, 12 and 13 of the Bankruptcy Code; maintaining and supervising a panel of private trustees; supervising the conduct of debtors in possession and other trustees; and ensuring that violations of civil and criminal law are detected and referred to the U.S. Attorney's Office for possible prosecution.

Applicants must possess a J.D. degree, be an active member of the bar in good standing, have extensive management experience, and outstanding academic credentials. Familiarity with bankruptcy law and accounting principles, litigation experience, and civil practice is preferred. Please submit a current SF-171 (Application for Federal Employees) or resume (no telephone calls, please) to: Anthony G. Sousa, U.S. Trustee, Department of Justice. Opera Plaza Building, 601 Van Ness Avenue, Suite 2008, San Francisco, California 92401. Current salary and years of experience will determine the appropriate salary level. The possible range is $48,000 - $77,900. Positions are open until filled.

* * * * *

APPENDIX

CUMULATIVE LIST OF CHANGING FEDERAL CIVIL POSTJUDGMENT INTEREST RATES

(As provided for in the amendment to the Federal postjudgment interest statute, 28 U.S.C. §1961, effective October 1, 1982)

Effective Date	Annual Rate
10-21-88	8.15%
11-18-88	8.55%
12-16-88	9.20%
01-13-89	9.16%
02-15-89	9.32%
03-10-89	9.43%
04-07-89	9.51%
05-05-89	9.15%
06-02-89	8.85%
06-30-89	8.16%
07-28-89	7.75%
08-25-89	8.27%
09-22-89	8.19%
10-20-89	7.90%
11-16-89	7.69%
12-04-89	7.66%
01-12-90	7.74%

Note: For a cumulative list of Federal civil postjudgment interest rates effective October 1, 1982 through December 19, 1985, see Vol. 34, No. 1, p. 25, of the United States Attorney's Bulletin, dated January 16, 1986. For a cumulative list of Federal civil postjudgment interest rates from January 17, 1986 to September 23, 1988, see Vol. 37, No. 2, p. 65, of the United States Attorneys Bulletin, dated February 15, 1989.

* * * * *

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Alabama, S	J. B. Sessions, III
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* * * * *

EXHIBIT
A

Office of the Attorney General
Washington, D. C. 20530

December 26, 1989

The Honorable Joseph R. Biden, Jr.
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This is in response to your December 6, 1989 letter concerning the planned consolidation of the Organized Crime Strike Forces with the United States Attorneys' Offices. As you know, the Congress last year tasked the Director of the Office of National Drug Control Policy (ONDCP) to conduct a study to evaluate the merits of any structural reorganization of any component in the Department of Justice engaged in the war on drugs, including any changes in the Organized Crime Strike Forces.

Subsequently, you and several other Senators requested that implementation of the proposed merger plan be postponed until Director Bennett completed his statutory task and reported his recommendations to Congress. Director Bennett has made his recommendations, and they endorse without reservation the proposed consolidation. Specifically, Director Bennett concluded:

> "The initiatives of the Attorney General concerning the oversight and management of the Organized Crime Strike Forces, and the Asset Seizure and Forfeiture program and the Organized Crime Drug Enforcement Task Forces should be implemented. (Report at 9)

The report concurs in our conclusion that the consolidation should increase efficiency and eliminate coordination problems. The Director recognized that the proposed consolidation was a change in management, not in direction, in our efforts against organized crime. He noted the proposal has sufficient safeguards to guarantee that the mission of the Strike Forces would not be altered, and that centralized oversight would ensure consistency in approach and maintenance of the level of effort in the organized crime area after transfer to the United States Attorneys' Offices. The Director stated in his report:

> After considering the views expressed both for and against the Attorney General's proposed restructuring of the Strike Forces, we recommend that the Attorney General's proposal go forward. It recognized the elements that have played a part in the success of that program and adds the potential for greater flexibility in providing additional prosecutive resources at the U.S. Attorney's direction, if needed. It also recognizes the need for a mechanism in the Department of Justice to monitor the commitment of resources and to maintain a Washington-based litigation capability to meet demands which may exceed, from time to time, the resources permanently assigned in the field. (Report at 11)

In addition, The General Accounting Office (GAO), in a September 29, 1989, report to Senator Nunn entitled "Nontraditional Organized Crime", concluded that not enough was being done to combat emerging organized crime groups, most of which are involved in the illegal distribution of drugs. The GAO report noted:

> . . . the lack of a consistent, national investigative approach; language differences, complicated by a shortage of skilled interpreters; and the difficulty in penetrating tightly knit ethnic communities are major reasons law enforcement agencies face a formidable task. (Report at 5).

This has been a major concern of mine as well. In my June 19, 1989, statement announcing this plan, I said:

> In this day when federal resources are scarce, however, we need to be not only effective, but efficient, in the attack upon organized crime. I am convinced that this new organizational structure will not only strengthen our efforts against traditional organized criminal families, but will also enhance our efforts against new organized crime elements such as those in the Asian communities and among gangs such as the Crips and Bloods and the Jamaican posses.

Consequently, I have concluded that further delay in implementation of the merger is not in the interest of effective law enforcement. The proposed consolidation has been debated since 1970, when the Ash Council on Executive Reorganization recommended integration of the Strike Forces into the United

States Attorneys' Offices. Over the years, United States Attorney Advisory Committees to three different Attorneys General have recommended consolidation. Four separate GAO reports have criticized deficiencies in the current system that this plan is designed to correct. Congressional attention has been particularly focused in the last year since the consolidation plan was made public.

I take seriously my obligation to manage the Department's resources to provide the most effective law enforcement possible. Consolidation of these two separate enforcement organizations offers substantial managerial benefits that should no longer be postponed.

Given the unequivocal support that the Director of ONDCP has given to this proposal, the GAO reports, the merits of the consolidation, and the need to move forward, expeditious implementation of this proposed consolidation, without further delay, is appropriate. A copy of the implementation order is attached for your information.

We have been informed by the House and Senate Appropriations Committees and by the House Judiciary Committee that they have no objection to our proceeding in this matter. Your letter of December 6, 1989 has requested a further postponement of our order pending Senate consideration of your bill to create a Narcotics and Organized Crime Division. The Department is strongly opposed to this proposal. Such a Division would require additional, duplicative Sections to review wiretaps, to facilitate extraditions, to manage a witness security program, to forfeit assets, to track money-laundering schemes, and to perform normal administrative overhead functions. Moreover, the creation of such a Division would encourage diversity in prosecutive standards and philosophy, where consistency is a paramount virtue. The Director of ONDCP, who was commissioned by Congress to study such a reorganization, has recommended against it. He noted that the creation of such a Division would require an inefficient and counterproductive duplication of administrative efforts. Specifically, Director Bennett concluded:

> . . . A new Division would add yet another element of bureaucracy to the drug enforcement effort within the Justice Department. That, in our view, would be a significant drawback. Four of the principal organization components of the Department that are directly involved in, or supportive of drug-related prosecution efforts, are in the Criminal Division. That division is where those components are best placed to

support the U.S. Attorneys and the other demands from within the Department. The establishment of a new division is not necessary and would not, by itself, enhance the civil and criminal law enforcement effort. (Report at 10).

At a time when the effort to contain international drug trafficking and money laundering is paramount in both the law enforcement community and the concerns of the American public, what is manifestly not needed is "yet another element of bureaucracy." We wholeheartedly subscribe to Director Bennett's rejection of the suggestion that a separate Division would enhance the effort against drugs.

I appreciate having the opportunity to discuss the consolidation proposal with you and your staff over the last several months. We all share an interest in furthering effective law enforcement. I hope you will not hesitate to contact me should you have any questions.

Sincerely,

Dick Thornburgh
Attorney General

Attachment

EXHIBIT B

OBSTRUCTION OF FEDERAL AUDIT (18 U.S.C. §1516) NEW PROTECTION FOR THE FEDERAL AUDITOR

Prepared by
Fraud Section, Department of Justice

The Anti-Drug Abuse Act of 1988 [1] contains an obstruction of audit provision, codified at 18 U.S.C. §1516, which makes it a crime to endeavor to influence, obstruct or impede a federal auditor in the performance of his official duties. [2] Section 1516 carries a maximum punishment of five years imprisonment and a fine of $250,000 for an individual and $500,000 for an organization.[3]

Although not extensive, the legislative history of section 1516 reflects that the statute is designed to provide federal auditors with the "same protection for obstruction that the investigator, administrative proceedings, and the grand jury have

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[1] Pub.L.No. 100-690, §7078, 102 Stat. 4181 (1988)

[2] 18 U.S.C. §1516, Obstruction of Federal Audit, provides:

(a) Whoever, with intent to deceive or defraud the United States, endeavors to influence, obstruct, or impede a Federal auditor in the performance of official duties relating to a person receiving in excess of $100,000, directly or indirectly, from the United States in any 1 year period under a contract or subcontract, shall be fined under this title, or imprisoned not more than 5 years, or both.

(b) For purposes of this section the term "Federal auditor" means any person employed on a full- or part-time or contractual basis to perform an audit or a quality assurance inspection for or on behalf of the United States.

[3] 18 U.S.C. §1516; 18 U.S.C. §3571.

in sections 1503, 1505, 1510, and 1512 of title 18 of the United States Code." [4] Congress felt that this protection was warranted because "in many successful investigations, government contractors have been able to avoid earlier detection by obstructing" audits.[5] Accordingly, section 1516 "prohibits a wide range of obstructive conduct such as destruction ...[or] ...fabrication of documents as well as intimidation of witnesses and contractor employees..."[6]

The legislative history and current federal law on obstruction of justice suggest that section 1516 applies to an endeavor to influence, obstruct or impede a federal audit by fabricating (to include making a false statement or giving false testimony) [7], altering [8], destroying [9] or concealing [10]

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[4] 134 Cong.Rec. S17371 (daily ed. Nov. 10, 1988). Neither the House nor the Senate produced a report to accompany the Anti-Drug Abuse Act of 1988.

[5] Id.

[6] Id.

[7] See, e.g., United States v. Laurins, 857 F.2d 529 (9th Cir. 1988); United States v. Langella, 776 F.2d 1078 (2d Cir. 1985), cert. denied, 475 U.S. 1019 (1986); United States v. McComb, 744 F.2d 555 (7th Cir. 1984).

[8] See e.g., United States v. Faudman, 640 F.2d 20 (6th Cir. 1981).

[9] See e.g., United States v. Shannon, 836 F.2d 1125 (8th Cir. 1988); United States v. McKnight, 799 F.2d 443 (8th Cir. 1986).

information, threatening an auditor [11], offering an auditor bribes or gratuities [12], or threatening or otherwise encouraging a third party not to cooperate with an auditor. [13]

The following five elements must be present to support a conviction under section 1516: [14]

1. A federal auditor was in the performance of his or her official duties.

2. Those official duties related to a person, or organization, receiving in excess of $100,000, directly or indirectly, from the United States in any one year period under a contract or subcontract.

3. The defendant knew that an auditor was in the performance of his or her official duties. [15]

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[10] See e.g., United States v. Lench, 806 F.2d 529 (9th Cir. 1986)

[11] See e.g., United States v. Fagan, 821 F.2d 1002 (5th Cir. 1987), cert. denied, 108 S.Ct. 697 (1988).

[12] See e.g., United States v. Silverman, 745 F.2d 1386 (11th Cir. 1984).

[13] See e.g.,United States v. Jeter, 775 F.2d 670 (6th Cir. 1985); United States v. Dougherty, 763 F.2d 970 (8th Cir. 1985); United States v. Murray, 751 F.2d 1528 (9th Cir. 1985), cert. denied, 474 U.S. 979 (1985).

[14] See United States v. Kahaner, 317 F.2d 459 (2d Cir. 1962), cert. denied, 375 U.S. 836 (1963); see generally 2 SAND, MODERN FEDERAL JURY INSTRUCTIONS §46-1 (1987 & Supp. 1988).

[15] See, United States v. Guzzino, 810 F.2d 687 (7th Cir. 1987); United States v. Capo, 791 F.2d 1054 (2d Cir. 1986). While these cases suggest that to be in violation of section 1516, the defendant must have knowledge that an auditor is in the performance of his official duties, neither the statute nor the legislative history appear to require knowledge of the federal nature of the auditor or his duties. The plain language of the

4. The defendant endeavored to influence, obstruct or impede the federal auditor in the performance of his or her official duties.

5. The defendant acted willfully, with the intent to deceive or to defraud the United States. [16]

Subsection 1516(b) broadly defines the term "Federal Auditor" to include any person "employed on a full-time or part-time or contractual basis to perform an audit or a quality assurance inspection for or on behalf of the United States". While clearly encompassing traditional government contract auditors, such as those from the Defense Contract Audit Agency, the definition also includes those persons engaged in quality assurance inspections under government contracts, persons not traditionally viewed as auditors. [17] This expansive definition

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statute reflects that the scienter requirement, the intent to deceive or to defraud the United States, is separate and distinct from the requirement that the endeavor to obstruct be directed to a federal auditor. See United States v. Yermian, 468 U.S. 63 (1984)(Proof of actual knowledge of federal agency jurisdiction is not required under 18 U.S.C. §1001); United States v. Feola, 420 U.S. 671 (1975)(In a prosecution under 18 U.S.C. § 111 for assaulting a federal officer, there is no requirement that the defendant know that the victim was a federal officer); United States v. Ardito, 782 F.2d 358 (2d Cir. 1986), cert. denied, 476 U.S. 1160 (1986)(Under 18 U.S.C. § 1503, there is no requirement of specific intent to interfere with a proceeding known by the defendant to be federal in nature).

[16] See United States v. Jeter, 775 F.2d 670 (6th Cir. 1985); United States v. Dougherty, 763 F.2d 970 (8th Cir. 1985).

[17] The Defense Logistics Agency has responsibility for conducting contract quality assurance inspections for contracts with the Department of Defense.

brings a substantial number of federal employees within the protection of section 1516 and should provide a powerful deterrent against contractor efforts to prevent the government from detecting that the contractor has failed to deliver goods and services in conformance with contract specifications. [18]

As a prerequisite to any violation of section 1516, the defendant must have knowledge that an auditor is engaged "in the performance of his official duties". [19] While it is unlikely that the courts will establish a threshold or rule by which some formal act will be required to establish the pendency of an auditor's official duties, some act by the auditor known to the defendant must be established.

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[18] Government contract quality assurance includes the various functions, including inspection, performed by the government to determine whether a contractor has fulfilled the contract obligations pertaining to quality and quantity. Federal Acquisition Regulation (hereinafter "FAR") 46.101. Inspection means examining and testing supplies or services (including, when appropriate, raw materials, components and intermediate assemblies) to determine whether they conform to contract requirements. Id. Quality assurance inspection clauses, which afford the government the right to make quality assurance inspections and tests, as appropriate, are required in government contracts. See FAR 56.202-2(a); FAR 46.501(a) (Government contract quality assurance shall be performed at such times (including any stage of manufacture or performance of services) and places (including subcontractors' plants) as may be necessary to determine that the supplies or services conform to contract requirements.)

[19] See United States v. Vesich, 724 F.2d 451, 454 (5th Cir. 1984). As previously noted, see footnote 15, supra, there is no requirement that the defendant have knowledge of the federal nature of the auditor or his duties.

Intentional cost mischarging, noncompliance with cost accounting standards, defective pricing, submission of false claims or certificates, and other improprieties commonly committed by contractors, often involve false statements or writings which, as a collateral matter, ultimately mislead or otherwise deceive an auditor. In most instances, however, these acts will not have been committed at the time that an auditor was in the performance of official duties known to the defendant, and will not therefore, constitute violations of section 1516. Such offenses are better charged, when appropriate, as false claims, false statements, or other applicable offenses.

Neither section 1516 nor the legislative history offers any guidance on the meaning of the phrase "in the performance of his official duties". However, cases decided under an analogous statute that makes criminal assault upon a federal officer engaged in the performance of his official duty [20], suggest that the phrase should not be interpreted narrowly. [21]

It is reasonable to conclude that where some connection can be shown between the auditor's duties relating to a contractor

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[20] 18 U.S.C. §111.

[21] See United States v. Streich, 759 F.2d 579, 584 (7th Cir. 1985), cert. denied, 474 U.S. 860 (1985)(test is whether officer is acting within scope of what he is employed to do, or is engaging in a personal frolic of his own; United States v. Boone, 738 F.2d 763 (6th Cir. 1984), cert. denied, 469 U.S. 1042 (1984)(the parameters of the statutory requirement that a Federal officer covered by the Act must be engaged in the performance of his official duties are inherently fluid); United States v. Stephenson, 708 F.2d 580 (11th Cir. 1983)(FBI agent acting in her official capacity when she was assaulted on her way to work).

(whether traditional audit activity or quality assurance inspection activity) and the endeavor to obstruct, the courts will find that the auditor is "in the performance of his official duties" as that phrase is used in section 1516. Moreover, there is no requirement that an actual audit or quality assurance inspection be ongoing at the time of the endeavor to obstruct. An auditor's duties clearly encompass activity conducted in preparation of and following an actual audit or quality assurance inspection. [22]

Consistent with the obstruction of justice statutes after which section 1516 was patterned [23], the operative word in section 1516 is "endeavor". As used in section 1516, "endeavor" means any effort or attempt to influence, obstruct or impede. [24] Section 1516 prohibits any attempt, effort, or endeavor to influence, obstruct or impede an audit, including situations where a defendant could have reasonably foreseen that the natural

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[22] See United States v. Fernandez, 837 F.2d 1031 (11th Cir. 1988), cert. denied, 109 S.Ct. 102 (1988)(in a prosecution under 18 U.S.C. § 1503, evidence was sufficient to establish that an assistant United States attorney was engaged in the "discharge of his duty" when the defendant threatened him on the street immediately after the defendant's brother had been sentenced as the assistant United States attorney's involvement in the case did not end at sentencing because there remained the possibility of an appeal or of post-sentencing motions).

[23] Chapter 73, title 18, United States Code.

[24] See United States v. Osborn, 385 U.S. 323, 333 (1966); United States v. Silverman, 745 F.2d 1386 (11th Cir. 1984).

and probable consequences of his or her endeavor would be to influence, obstruct or impede an audit. [25] Typical endeavors within the scope of section 1516 might include concealing or destroying records, fabricating or altering records, lying to an auditor, threatening an auditor, offering a gift or gratuity to an auditor, encouraging another not to cooperate with an audit, or causing a third person to do any of the foregoing. [26]

To violate section 1516, an individual must act with knowledge and intent. [27] That is, the endeavor to influence, obstruct or impede an audit must be done voluntarily and intentionally and not because of mistake, accident, ignorance, or other innocent reason. [28] Moreover, the endeavor must be a willful act of the defendant. Under section 1516, the willful act to obstruct an audit is one done voluntarily and intentionally, with the specific intent to deceive or to defraud

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[25] See United States v. Fields, 838 F.2d 1571 (11th Cir. 1988); United States v. Silverman, supra.

[26] See footnotes 7 through 13, supra.

[27] See United States v. Jeter, 775 F.2d 670, 679 (6th Cir. 1985)(interpreting the requirement under 18 U.S.C. §1503 that an endeavor to interfere with the due administration of justice must be done "corruptly").

[28] See United States v. Touloumis, 771 F.2d 235, 243 (7th Cir. 1985).

the United States. [29] In this regard, the defendant must purposely intend that his obstructive endeavor will deceive or defraud the United States.[30]

Intent to deceive and intent to defraud are not synonymous. Intent to deceive involves a willful act to induce a false belief or to mislead. [31] To act with the intent to defraud means to act willfully to deceive or cheat for the purpose of causing financial loss to another or bringing about financial gain to one's self. [32] In either case, however, section 1516 requires that the endeavor to influence, obstruct or impede an audit, to be criminal, be done with the specific intent to deceive or to defraud the United States.

In the typical obstruction of audit prosecution, it is likely that the endeavor to influence, obstruct or impede an audit will clearly involve an attempt to mislead the auditor in

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[29] See Jeter, supra.

[30] While proving the requisite intent to deceive or to defraud may necessarily involve showing that the defendant had actual knowledge of the federal nature of both the auditor and his official duties, the language of section 1516 does not make the defendant's actual knowledge of the federal nature of the auditor and his official duties a separate element of intent. See footnote 15, supra.

[31] United States v. Lichenstein, 610 F.2d 1272, 1276-1277 (5th Cir. 1980), cert. denied, 447 U.S. 907 (1980).

[32] United States v. McGuire, 744 F.2d 1197, 1200 (6th Cir. 1984), cert. denied, 471 U.S. 1004 (1985).

some fashion such that an intent to deceive the United States can be readily proved. It is equally likely that in most instances, the attempt to mislead the auditor will be for the pecuniary gain of the contractor (e.g., avoiding the detection and disallowance of costs improperly charged by the contractor or the rejection of an equitable adjustment or other claim by the contractor) such that an intent to defraud the United States will be evident. If this turns out to be the case, the courts may find no analytical difference between an intent to defraud and an intent to deceive for the purpose of section 1516. [33]

Both the language of section 1516 and the legislative history are silent on the question whether, for a defendant charged with intent to deceive, the falsity at issue must be to a material fact. Without a materiality requirement, a defendant who willfully provides inconsequential but misleading information to an auditor could be culpable under section 1516. The courts may read a materiality requirement into section 1516, when an intent to deceive is charged, to ensure the reasonable application of the statute and to exclude trivial falsehoods from the scope of section 1516. [34] In the context of an audit, any

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[33] In approving a trial court's jury instruction for 18 U.S.C. §1005, which failed to distinguish between an intent to defraud and an intent to deceive a bank officer, the Sixth Circuit failed to perceive intent to deceive and defraud as distinct theories of liability. United States v. McGuire, 744 F.2d 1197 (6th Cir. 1984), cert. denied, 471 U.S. 1004 (1985).

[34] See United States v. Chandler, 752 F.2d 1148, 1150-51 (6th Cir. 1985).

falsity having a natural tendency to influence, or having the capability of influencing, an auditor's actions or decisions, would be material. [35] As a practical matter, imposition of a materiality requirement would not be unduly restrictive. If a falsity is not material, it is unlikely that sufficient evidence would exist to prove the existence of an endeavor to obstruct an audit with intent to deceive in the first instance.

To trigger the prohibitions of section 1516, the audit activity to which the endeavor to influence, obstruct or impede is directed must relate to a person or organization receiving more than $100,000 from the United States under a contract or subcontract in any one year period. This jurisdictional language focuses not on the nature or the size of the contract or subcontract to which the audit actually pertains, but is applied to the person or organization being audited.

If that person or organization receives more than $100,000 from the United States under one or more contracts or subcontracts in any one year period, section 1516 can fairly be read to apply regardless of the value of the contract to which the audit at issue pertains. Nor does the language of the statute appear to require that each contract or subcontract must individually exceed the $100,000 threshold. If a person or organization receives an aggregate in excess of $100,000 under one or more contracts or subcontracts, each of which has a value

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[35] Id.

of $100,000 or less, from the United States in any one year period, the jurisdictional language of section 1516 will be satisfied.

Section 1516 applies only to a person or organization "receiving" the $100,000 threshold amount. A literal interpretation of the word "receiving" suggests that the person or organization must have actually been paid or otherwise have been credited with payment by the United States before that amount will apply to the $100,000 requirement. However, such a narrow interpretation would defeat the purpose of section 1516 by excluding many audit functions from its scope. For example, pre-award surveys, audits of cost and pricing data submitted with a proposal, and quality assurance inspections of first items often will be conducted prior to any payment by the United States to the contractor. Requiring actual payment by the United States before section 1516 can be applied would thus allow contractors in many cases to avoid the early detection of fraud by obstructing an audit without regard to the prohibitions of section 1516, the very evil sought to be addressed by the statute's enactment.[36] Accordingly, a more reasonable interpretation, consistent with the legislative purpose of section 1516, is that "receiving in excess of $100,000" applies

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[36] See text accompanying footnotes 4 - 6, supra.

to amounts paid as well as to amounts due or owing under one or more contracts or subcontracts in any one year period.

The "1 year period" used in section 1516 is not further defined by the statute or explained by the legislative history. However, the use of the word "any" to modify the phrase "1 year period", together with the use of the present tense of the verb "receiving", suggests that there is no limit to the number of years past, or to the period of time in the future in which money is owed or due, that may be considered in determining whether the $100,000 threshold is met.

Section 1516 does not create for government auditors new or expanded audit rights or rights of access to contractor records that otherwise would be beyond the scope of a government contract audit. The extent of the government's access to contractor records in an audit remains circumscribed by the statutory and contractual provisions that authorize access, and by judicial and administrative interpretations of those provisions. [37]

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[37] See e.g., 10 U.S.C. §2306a(f)(government granted right to examine contractor records related to the contract proposal, negotiations, pricing, and performance for the purpose of evaluating cost and pricing data submitted by the contractor); 10 U.S.C. §2313 (government authorized to inspect the plant and audit the books and records of a contractor performing a cost or cost-plus-fixed-fee contract); FAR 15.106-2 (audit negotiation requirement); FAR 52.214-26 (audit sealed bidding); FAR 52.215-2 (audit negotiation clause); FAR 52.216-7 (allowable cost and payment audits); FAR 52.230-3 (audit for cost accounting standards compliance); FAR 52.232-16 (audit of progress payments); United States v. Newport News Shipbuilding Corporation, 837 F.2d 162 (4th Cir. 1988) (statutory subpoena power of DCAA extends to cost information related to a government contract. DCAA does not have unlimited power to demand access to all internal corporate materials of companies performing cost-type contracts for the government.)

Section 1516 is not a sword with which auditors may threaten contractors in an effort to secure access to records.

A contractor may have legitimate, good-faith reasons for refusing to disclose certain records or documents or for requiring an auditor to meet procedural or other requirements prior to having access to contractor records or employees. Accordingly, not every instance where a contractor denies an auditor access to records or to employees will constitute a violation of section 1516. Auditors should pursue established administrative procedures in an effort both to obtain the access sought and to delineate more clearly the facts surrounding the denial of that access. [38] Referral of cases for suspected violations of section 1516 should be made in cases where it is readily apparent that a contractor or other individual is endeavoring, with the intent to deceive or to defraud the United States, to influence, obstruct or impede the audit. Auditors with questions in that regard should seek guidance from the Department of Justice Defense Procurement Fraud Unit or from the appropriate United States Attorney's office.

The following are some factual scenarios designed to illustrate the scope of section 1516.

Example 1

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[38] See e.g., DCAA CONTRACT AUDIT MANUAL, para 1-504.4, July 1989.

The manager of a contractor's marketing department systematically changes employee timesheets to reflect as allowable marketing costs a significant amount of time actually spent on unallowable marketing costs such as advertising, lobbying, and public relations. As a result, during a subsequent audit by DCAA, the auditor was unable to detect, by a review of the false timesheets, the cost mischarging.

The acts of the manager are not, under these facts, a violation of section 1516. At the time that the manager changed the timesheets, a federal auditor was not in the performance of his official duties. To violate section 1516, the endeavor to influence, impede or obstruct must be committed at a time that an auditor is in the performance of official duties known to the defendant.

Example 2

Although the manager in Example 1 changed the timesheets, he did not change a weekly activity report which accurately reflected labor costs. Upon learning that DCAA was about to initiate an audit of labor costs in his department, the manager collected all the weekly activity reports and destroyed them. When questioned by the auditor as to the existence of those reports, the manager denied that they ever existed.

Both the destruction of records that the manager knew were being sought (or could reasonably have anticipated would be sought) and the false statement to the auditor about the existence of the records clearly constitute endeavors to

influence, obstruct or impede the auditor in his official duties with the intent to deceive and to defraud, and as such constitute a violation of section 1516. The same conclusion would obtain had the manager fabricated a weekly activity report corroborating the false timecards and presented or made available that fabricated report to the auditor.

Example 3

An auditor was evaluating a price proposal submitted by a contractor and found, while examining the contractor's overhead rate, that the contractor had monthly rental costs approximately one half of those submitted with the proposal. When questioned about this, the contractor submitted rental receipts in support of his proposal that the auditor knew were false. The auditor was not influenced or impeded in any way by the false rental receipts.

The submission of false records to the auditor by the contractor with the intent to deceive is a violation of section 1516. The intent at issue in the context of section 1516 is that of the individual endeavoring to obstruct the auditor. It is not material whether the endeavor was successful or whether the auditor was in fact influenced, obstructed or impeded.

Example 4

Assume that in Example 3, upon being questioned about the rental costs by the auditor, the treasurer of the contractor became verbally belligerent and abusive with the auditor,

screaming in a loud voice, while standing extremely close to the seated auditor, that the auditor was stupid, incompetent, and did not know what he was talking about.

While this conduct is rude and in bad taste and is undoubtedly an endeavor to influence, obstruct or impede the auditor, it is probably not, without more, a violation of section 1516. Generally rude behavior to an auditor does not rise to the level of a criminal offense under section 1516.

Example 5

Assume that in Example 4, the treasurer suggested to the auditor that it would be better for the auditor's health if he stopped making any further inquiries or reports about the rental costs because unfortunate accidents were known to happen to nosey auditors.

Assuming that the circumstances of such a statement indicated that it was made seriously, any such direct or implied threat of physical harm to an auditor or a third person associated with the auditor will constitute a violation of section 1516.

Example 6

During a routine floor check, an employee refuses to speak with an auditor and will not provide the auditor or the employer any reason for that refusal to speak with the auditor.

Generally, the refusal of a contractor employee to speak with an auditor, without more, will not constitute obstruction of

an audit. While the duty of the employee to speak with the auditor can be debated [39], proving criminal intent, if any exists, in such an instance would be problematic.

Example 7

After hearing that an auditor may be interviewing some of his employees in connection with the audit of an equitable adjustment claim, a manager instructs his employees that under no conditions, subject to immediate termination, will they speak with the auditor or give the auditor any records that he may request.

At first glance, such a scenario would appear to be a violation of section 1516 in that the manager is seeking to have third parties obstruct the audit. However, in such cases it would always be important to determine the reasons for the manager's instructions. For example, there would be no violation if the manager entertained a good faith belief that he had the authority to direct such noncooperation or the mistaken belief that he was implementing company policy. A more likely scenario would arise in the context of a contractor making it exceedingly difficult for an auditor to obtain interviews or records by

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[39] See Covington & Gruss, Corporate Employee's Entitlement to Use Immunity, 47 FEDERAL CONTRACTS REPORT 743 (April 27, 1987). The authors criticize the position of DCAA, expressed in a March 10, 1986 memorandum, that pursuant to the audit-negotiation clause of the Federal Acquisition Regulation (FAR 52.215-2) and other authority, an individual employee has no personal right to decide whether to talk with a DCAA auditor and that the contractor is obliged to instruct the employee to make himself available.

requiring unreasonable and dilatory procedural steps such as requests to be made in writing weeks in advance, all contact to be through only one person who is never available in person or by telephone, etc. Although placing such roadblocks in the way of an audit may fall within the scope of section 1516, in the absence of direct evidence that the defendant used the procedural devices to obstruct an audit, it would be difficult to prove a criminal obstruction case where the requisite criminal intent must be inferred from the access requirements established by a contractor. The preferable solution in such cases is to pursue the appropriate administrative sanctions such as disallowance of costs or suspension of contract payments.

Example 8

During an audit of a contractor's cost proposal, a contractor refuses to disclose an internal estimate of cost used to prepare the contractor's final certificate of cost and pricing data. The contractor tells the auditor that based on the advice of his attorneys, he believes that such an estimate is not within the disclosure requirements of the Truth in Negotiations Act. The auditor responds by threatening the contractor with a fraud referral for a violation of section 1516.

Where a contractor refuses an auditor access to records in apparent good faith, it is not appropriate to use the threat of section 1516 as a means by which to expand the auditor's access. In such instances, auditors should refer to internal administrative procedures to deal with such a denial of access.

Example 9

Knowing that a quality assurance representative from a Defense Contract Administrative Services Management Area office is coming to a contractor's facility to inspect a recently manufactured lot of electronic circuit boards, a production control manager physically switches the lot to be inspected with a lot already having passed inspection. Having fallen behind in its production schedule, the contractor manufactured the latest lot without subjecting it to time-consuming quality control tests, and the manager believes that from 30% to 40% of the lot would fail inspection.

The manager's actions constitute an endeavor to obstruct the quality assurance inspection done with an obvious intent to deceive the quality assurance representative, and as such violates section 1516. "Federal Auditor" as defined in section 1516 includes any person employed to perform a quality assurance inspection as well as to perform an audit.

EXHIBIT C

Guideline Sentencing Update

FEDERAL JUD

Guideline Sentencing Update will be distributed periodically by the Center to inform judges and other judicial personnel of selected federal court decisions on the sentencing reform legislation of 1984 and 1987 and the Sentencing Guidelines. Although the publication may refer to the Sentencing Guidelines and policy statements of the U.S. Sentencing Commission in the context of reporting case holdings, it is not intended to report Sentencing Commission policies or activities. Readers should refer to the Guidelines, policy statements, commentary, and other materials issued by the Sentencing Commission for such information.

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VOLUME 2 • NUMBER 17 • DECEMBER 6, 1989

Guidelines Application

DEPARTURES

Fourth Circuit holds lack of prior criminal record and fact that possible loss of employment may make restitution more difficult are not proper grounds for departure; holds finding on minimal planning was "clearly erroneous." Defendant pled guilty to check kiting and making false statements to a bank. He borrowed money from friends to pay back the illegally obtained funds, but still owed over $6,400 to the banks. The district court resolved a dispute over the appropriate offense level by finding the offense did not involve "more than minimal planning," U.S.S.G. § 2F1.1(b)(2), resulting in an offense level of 8 and guideline range of 2–8 months. Under the Guidelines, defendant could be sentenced to probation, with a minimum two months of intermittent or community confinement. *See* U.S.S.G. §§ 5B1.1(a)(2), 5C1.1(c). The court imposed a term of probation for five years with no confinement, holding that departure was warranted because defendant had not "been in any trouble before," and because a term of imprisonment could cost defendant his job and make restitution to the banks and repayment to his friends more difficult.

The appellate court reversed, finding that both the departure and offense level calculation were improper. The court held that two points must be added to the offense level under § 2F1.1(b)(2) because "the record is undisputed that the check kiting scheme required more than minimal planning and . . . any finding of fact that the increment was not justified would be clearly erroneous. As a matter of law the increment must be added."

The departure was improper because "the district court cannot credit [defendant] for lack of a record of prior criminal behavior. Th[at] fact . . . is taken into consideration in the Sentencing Table. . . . Having received credit for his lack of prior offenses in the determination of the sentencing range, [he] is not entitled to further credit in the form of a downward adjustment."

The court also concluded that "we do not think that the economic desirability of attempting to preserve [defendant's] job so as to enable him to make restitution warrants a downward adjustment," reasoning that "[defendant] is no different from any other person convicted of a similar offense. Both would be unable to work; it is not unlikely that both would be discharged; without earned income both would be hindered or prevented from making restitution." In remanding, the court noted that the various conditions of community and intermittent confinement "provide the sentencing court with other options that may allow [defendant] to keep his job."

U.S. v. Bolden, No. 88-5183 (4th Cir. Nov. 22, 1989) (Winter, J.).

Other Recent Cases:

U.S. v. Lucas, No. 88-2239 (6th Cir. Nov. 13. 1989) (Milburn, J.) (district court may depart upward to account for psychological injury to robbery victims; robbery guideline allows departure for physical injury to robbery victims, but does not address psychological injury).

U.S. v. Smith, No. 88-2817 (10th Cir. Nov. 3, 1989) (Moore, J.) (sentencing court's "brief statement" that "the force and violence used by the defendant in committing the offense . . . justifies an upward departure from the guidelines" does not satisfy the requirement for a specific statement of reasons to justify a departure).

U.S. v. Pitman, No. 89-1264 (6th Cir. Nov. 2, 1989) (per curiam) (unpublished disposition) (convictions that occurred more than 10 years prior to current offense, and thus could not be used for calculating criminal history score, could be used as basis for departure under U.S.S.G. § 4A1.3, p.s.; also, large sum of money found at defendant's home at time of arrest and other reliable evidence indicating defendant was a drug trafficker provided additional basis for departure).

U.S. v. Sadler, No. 88-10055 (D. Idaho Oct. 2, 1989) (Ryan, C.J.) (holding that "defendant's educational and vocational skills, mental and emotional condition, previous employment record, and family and community ties, although not ordinarily relevant [pursuant to U.S.S.G. § 5H1.1, *et seq.*, p.s.], exist in the present case in such a quality and to such a degree as to warrant a downward departure"). *Cf. U.S. v. Rodriguez*, No. 88 CR 117 (S.D.N.Y. Oct. 27, 1989) (Guidelines' general prohibition against consideration of defendants' "personal characteristics" does not preclude departure in "atypical" case) (2 *GSU* #16).

DETERMINING OFFENSE LEVEL

Seventh Circuit holds that conviction for offense that occurred during and was related to conspiracy of current conviction may count toward career offender status. Defendant was convicted of conspiracy to possess cocaine with intent to distribute. He was sentenced to 30 years in prison as a career offender under U.S.S.G. § 4B1.1. "Two

prior felony convictions" are required for career offender status, and defendant disputed one of the convictions used by the court. The conspiracy in the instant offense took place in Milwaukee and lasted from Nov. 1, 1987, to Sept. 13, 1988. During the course of the conspiracy, defendant was arrested and convicted in California for possession of cocaine. Because the California cocaine was connected with the Milwaukee conspiracy, "[d]oubt whether this was a 'prior conviction' within the meaning of the guidelines arises from the fact that although the [California] conviction preceded his current conviction, it punished conduct that took place after the offense underlying the current conviction . . . had begun and that indeed was part of that offense."

The appellate court held that the California conviction was properly deemed a "prior felony conviction." "Nothing in the guidelines' definition of a career offender requires . . . that every act constitutive of the offense underlying his current conviction have been commited after the prior conviction, and we can think of no reason for such a requirement." The court concluded that "the 'subsequent' offense need not be entirely subsequent to preserve the relation between the guideline and its animating policy of punishing the recidivist more severely."

The court also reasoned that, in this particular case, "the evidence presented to the jury makes clear that [defendant's] subsequent participation in the conspiracy was sufficient by itself to support the conspiracy conviction. The 'instant offense' was 'subsequent' in the practical sense that the part of the conspiracy that preceded the prior conviction could be lopped off without affecting [his] guilt."

U.S. v. Belton, No. 89-1649 (7th Cir. Nov. 20, 1989) (Posner, J.).

Sentencing Procedure

Fourth Circuit carves "very narrow" exception to Fed. R. Crim. P. 35 to allow district court to amend improper guideline sentence. Defendant was convicted of distributing cocaine. Her sentencing range was 6–12 months, and she was not eligible for probation. The district judge stated that he intended, pursuant to U.S.S.G. § 5C1.1(c), to sentence defendant to three months' imprisonment followed by supervised release with a condition of three months of community or intermittent confinement. At sentencing, however, the judge actually sentenced defendant to three months of community confinement followed by three months of supervised release. Neither the government nor defendant objected, but the judge "subsequently realized that he had incorrectly interpreted section 5C1.1(c). Without notice to the parties the district judge then sua sponte issued an amended judgment and sentencing order that changed [defendant's] sentence" to that which he originally intended.

The appellate court held that the court could amend the sentence. Although Rule 35 substantially restricts the power of district courts to amend sentences, "this is an unusual case and we recognize the inherent power in a court to correct an acknowledged and obvious mistake." The court cautioned, however, that this "inherent power is not without limitation," and held "that the authority to modify a sentence to correct an acknowledged and obvious mistake exists only during that period of time in which either party may file a notice of appeal. After that time, we believe that the sentence has become final, and the district court lacks any authority to modify it."

The court stressed "that our holding is a very narrow one. The power of a district court to amend a sentence does not extend to a situation where the district judge simply changes his mind about the sentence. Nor should this be interpreted as an attempt to reenact former Rule 35 by judicial edict. Our decision is limited to the case where the district court states that a particular kind of sentence is to be imposed and then imposes a different sentence solely because of an acknowledged misinterpretation of the pertinent guidelines section."

The appellate court found, however, that the district court may not increase the sentence in defendant's absence, Fed. R. Crim. P. 43(a), and remanded for resentencing.

U.S. v. Cook, No. 89-5622 (4th Cir. Nov. 22, 1989) (Wilkins, J.).

Other Recent Cases:

U.S. v. Soliman, No. 89-1162 (2d Cir. Nov. 13, 1989) (Kaufman, J.) (upholding sentencing judge's consideration of foreign conviction in deciding to sentence at top of guideline range, but cautioning district judges to be aware of "possible constitutional infirmities surrounding a foreign conviction" and to exercise "informed discretion" in deciding whether to rely on foreign conviction to increase sentence within range or to justify departure under U.S.S.G. § 4A1.3(a), p.s.).

U.S. v. McDowell, No. 89-3265 (3d Cir. Oct. 25, 1989) (Rosenn, Sr. J.) ("a sentencing court considering an adjustment of the offense level . . . need only base its determination on the preponderance of the evidence" standard, and "the burden of ultimate persuasion should rest upon the party attempting to adjust the sentence").

Constitutionality

U.S. v. Francois, No. 88-5110 (4th Cir. Nov. 22, 1989) (Chapman, J.) (rejecting due process challenge to substantial assistance provisions: "the requirement that the government file the motion does not deprive the defendant of any constitutional rights whether the failure to make the motion be under [U.S.S.G.] § 5K1.1 or under [Fed. R. Crim. P.] 35(b), because there is no constitutional right to the availability of a substantial assistance provision to reduce a criminal sentence").

U.S. v. Savage, No. 89-1643 (7th Cir. Nov. 2, 1989) (Easterbrook, J.) (rejecting claim that U.S.S.G. § 2J1.6, Failure to Appear, is unconstitutional on the ground that it does not allow sentencing court to consider mitigating factors such as prompt voluntary surrender).

Guideline Sentencing Update

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Guidelines Application

DEPARTURES

First Circuit holds departures are warranted only where the circumstances "are sufficiently unusual to remove a case from the heartland" of typical guideline cases. Defendant pled guilty to a string of bank robberies and robbery attempts committed in a three-week period. The district court concluded a downward departure was warranted because defendant did not use a weapon, was "ineffective" and "half-hearted" as a bank robber, committed the crimes during a brief period when he suffered from cocaine addiction, had a minimal prior record, and expressed the desire to reform.

The appellate court vacated the sentence, finding that most of the district court's reasons for departure were factors already considered by the Sentencing Commission. The court also found that two factors that might warrant departure—defendant's excellent conduct in prison before sentencing and his "lack of enthusiasm" in committing the robberies—were "clearly insufficient" to support a departure in this case. The court stressed that "departures must be bottomed on meaningful atypicality . . . , the circumstances triggering a departure must be truly 'unusual,'" and "the trial court's right to depart, up or down, must be restricted to those few instances where some substantial atypicality can be demonstrated."

U.S. v. Williams, No. 89-1689 (1st Cir. Dec. 15, 1989) (Selya, J.).

Other Recent Cases:

U.S. v. Coe, No. 89-1205 (2d Cir. Nov. 30, 1989) (Newman, J.) (short span of time in which robberies were commiued and defendant's false claim of having weapon were not permissible grounds for upward departure under U.S.S.G. § 5K2.0, p.s.; departure was warranted because defendant's pattern of behavior indicated he was likely to commit future offenses, U.S.S.G. § 4A1.3, p.s., and district court should follow procedure for such departures set forth in *U.S. v. Cervantes*, 878 F.2d 50 (2d Cir. 1989), by determining which criminal history category "best encompasses the defendant's prior history" and then using the corresponding sentencing range for that category "to guide its departure").

U.S. v. Mahler, No. 88-5193 (4th Cir. Dec. 8, 1989) (Widener, J.) (use of replica of handgun in robbery warranted upward departure—replicas are not covered in the Guidelines definitions of firearm or dangerous weapon, and are therefore "an aggravating circumstance" not adequately considered by Sentencing Commission; sentencing court treated replica as an unloaded gun under U.S.S.G. § 2B3.1(b)(2)(C) and increased offense level by three).

U.S. v. Jordan, No. 89-1774 (7th Cir. Dec. 7, 1989) (Cummings, J.) (departure from 70–87 months to 120 months warranted because defendant's attempt to flee from arrest resulted in injury to government agent, there was evidence defendant continued to deal and use drugs while awaiting sentencing, and criminal history score did not represent seriousness of past activity).

U.S. v. Yellow Earrings, No. 89-5142 (8th Cir. Dec. 1, 1989) (Bright, Sr. J.) (affirming downward departure for assault defendant, from range of 41–51 months to 15 months, because victim "substantially provoked" the offense (*see* U.S.S.G. § 5K2.10, p.s.)).

DETERMINING OFFENSE LEVEL

U.S. v. Otero, No. 89-3077 (11th Cir. Dec. 11, 1989) (per curiam) (defendant who claimed he was unaware that co-conspirator had firearm was properly given enhancement for firearm possession under U.S.S.G. § 2D1.1(b)). *Cf. U.S. v. Missick*, 875 F.2d 1294 (7th Cir. 1989) (departure for defendant who supplied drugs to persons possessing weapons was not proper because defendant had no direct contact with and was not charged as co-conspirator with those who possessed weapons).

U.S. v. Mocciola, No. 89-1471 (1st Cir. Dec. 5, 1989) (Aldrich, Sr. J.) (defendant who pled guilty to drug possession charge may be given enhancement for possession of firearm under U.S.S.G. § 2D1.1(b)(1) despite acquittal by jury on charge of using a weapon during a drug trafficking crime under 18 U.S.C. § 924(c)(1)). *See also U.S. v. Isom*, 886 F.2d 736, 738 & n.3 (4th Cir. 1989) (acquittal does not necessarily preclude use of underlying facts of offense at sentencing); *U.S. v. Juarez-Ortega*, 866 F.2d 747, 749 (5th Cir. 1989) (per curiam) (same); *U.S. v. Ryan*, 866 F.2d 604, 609 (3d Cir. 1989) (same).

U.S. v. Green, No. 89-5198 (8th Cir. Nov. 15, 1989) (Wollman, J.) (although gun was not loaded and was found in different room from most of drugs, defendant's "undenied possession of a firearm and ammunition in the same place where she conducted drug transactions and the additional hazard the presence of the firearm created in her drug operation satisfy us that connection of the gun to the offense is not clearly improbable," and an upward adjustment under U.S.S.G. § 2D1.1(b)(1) was proper).

U.S. v. Gerante, No. 89-1235 (1st Cir. Dec. 8, 1989) (Campbell, C.J.) (sentencing court properly converted $68,000 that originated from prior drug transaction into estimated quantity of cocaine to determine relevant quantities for purpose of calculating base offense level under U.S.S.G. § 2D1.1(a)(3); case must be remanded, however, because court did not make explicit finding required by Fed. R. Crim. P. 32(c)(3)(D) on disputed issue of whether the $68,000 did in fact originate from prior drug transaction).

U.S. v. Garcia, No. 89-1499 (5th Cir. Nov. 30, 1989) (Jolly, J.) (court may base offense level on amount of drugs under negotiation in an uncompleted drug transaction, *see* U.S.S.G. §§ 2D1.1, comment. (n.12), 2D1.4, comment. (n.1) (Nov. 1989); here, defendant sold eight ounces of cocaine but had negotiated to sell 16 ounces, and the larger amount was properly used to determine base offense level).

U.S. v. Lanese, No. 89-1133 (2d Cir. Nov. 29, 1989) (Re, J.) (remanding for resentencing: "district court did not make a specific finding of the identities of the 'five or more participants,' or that the criminal activity was 'otherwise extensive,'" and thus appellate court could not determine whether defendant's sentence was correctly increased for being a "manager or supervisor" under U.S.S.G. § 3B1.1(b); also reversed codefendant's sentence because finding that he was a "manager or supervisor" was "clearly erroneous").

U.S. v. Ford, No. 89-3205 (6th Cir. Nov. 27, 1989) (Kennedy, J.) (no double jeopardy when sentencing court used same information, given by defendant to probation officer, to grant defendant reduction for acceptance of responsibility and to impose sentence near high end of guideline range).

Criminal History

U.S. v. Vickers, No. 89-3308 (5th Cir. Dec. 8, 1989) (per curiam) (agreeing with *U.S. v. Goldbaum*, 879 F.2d 811 (10th Cir. 1989), and *U.S. v. Ofchinick*, 877 F.2d 251 (3d Cir. 1989), that it is not improper to add points to criminal history score, pursuant to U.S.S.G. § 4A1.1(d) and (e), of defendant convicted of escape from custody). *See also U.S. v. Wright*, No. 88-1277 (9th Cir. Dec. 4, 1989) (Canby, J.) (when defendant is convicted of escape offense it is not error or violation of double jeopardy to add criminal history points under U.S.S.G. §§ 4A1.1(d) and (e)). *But see U.S. v. Bell*, 716 F. Supp. 1207 (D. Minn. 1989) (adding criminal history points under § 4A1.1(d) amounts to double counting); *U.S. v. Clark*, 711 F. Supp. 736 (S.D.N.Y. 1989) (same).

U.S. v. Williams, No. 89-50017 (9th Cir. Dec. 6, 1989) (Nelson, J.) (not a violation of due process to use juvenile conviction in criminal history calculation even though there was no right to jury trial in the juvenile adjudication; also, "commitment to juvenile hall is a form of confinement" that falls within U.S.S.G. § 4A1.2(d)(2)(A)).

Sentencing Procedure

Fourth Circuit holds that limited power to sentence below statutory minimum for substantial assistance, 18 U.S.C. § 3553(e), also applies to 18 U.S.C. § 3561(a)(1) to allow probation for Class A and B felonies. Defendant pled guilty to conspiracy to possess and distribute cocaine. He argued that the circumstances of his case made a sentence of probation appropriate, and that 18 U.S.C. § 3553(e) allowed it. The district court disagreed, holding that the prohibition against probation for Class A and B felonies in 18 U.S.C. § 3561(a)(1) applied.

The appellate court remanded, holding that probation could be given to a defendant who qualified under § 3553(e): "As we view Section 3553(e), there is no logical distinction between the two situations, i.e., between the mandatory minimum sentence and the prohibition against probation. The statute was intended to free the sentencing judge to exercise, on motion of the Government, a prudent discretion by disregarding, where there has been substantial governmental assistance by the defendant, both the affirmative mandate to impose a minimum prison sentence and the negative mandate of Section 3561(a)(1) not to grant probation to a Class A or a Class B offender."

U.S. v. Daiagi, No. 88-5161 (4th Cir. Dec. 15, 1989) (Russell, J.).

Other Recent Cases:

U.S. v. Rosa, No. 88-3692 (3d Cir. Dec. 8, 1989) (Stapleton, J.) (defendant in conspiracy that began before and ended after Nov. 1, 1987, properly sentenced under Guidelines despite claim he withdrew from the conspiracy before then—defendant failed to "affirmatively renounce" conspiracy before that date; remanded for resentencing, however, for district court to make specific findings required by Fed. R. Crim. P. 32(c)(3)(D) when defendant disputes information in presentence report, here the government's version of offense).

U.S. v. Jordan, No. 89-1774 (7th Cir. Dec. 7, 1989) (Cummings, J.) (holding defendant not entitled to notice before sentencing hearing that district court would depart—defendant was "not unfairly surprised with new evidence or information" at the hearing and was allowed to contest all factors used to determine his sentence). *Cf. U.S. v. Nuno-Para*, 877 F.2d 1409 (9th Cir. 1989) (defendant must be given notice of and opportunity to comment on factors that may constitute grounds for departure prior to sentencing, Fed. R. Crim. P. 32(a)(1)); *U.S. v. Cervantes*, 878 F.2d 50 (2d Cir. 1989) (same); *U.S. v. Otero*, 868 F.2d 1412 (5th Cir. 1989) (same).

Constitutionality

U.S. v. Cyrus, No. 88-3156 (D.C. Cir. Dec. 12, 1989) (Mikva, J.) (higher penalties in Guidelines for possession of cocaine base (crack) than for cocaine do not violate equal protection, due process, or the eighth amendment).

EXHIBIT D

U.S. Department of Justice

Office of the Deputy Attorney General

Executive Office for Asset Forfeiture

Washington, D.C. 20530

January 11, 1990

MEMORANDUM

TO: All United States Attorneys
Assistant Attorney General, Criminal Division
Director, Federal Bureau of Investigation
Administrator, Drug Enforcement Administration
Commissioner, Immigration and Naturalization Service
Director, United States Marshals Service

FROM: Cary H. Copeland CHC
Director
Executive Office for Asset Forfeiture

SUBJECT: Seizure of Forfeitable Property

I. Ex Parte Pre-Seizure Judicial Review. Pre-seizure judicial authorization of property seizures serves multiple purposes, including the following:

A. allows neutral and detached judicial officers to review the basis for seizures before they occur;

B. enhances protection for Departmental officers against potential civil suits claiming wrongful seizures; and

C. reduces the potential that the public will perceive property seizures to be arbitrary and capricious.

II. Pre-Seizure Judicial Review Required for Seizure of Real Property. In all cases, Department of Justice officials shall obtain ex parte judicial approval prior to seizure of realty. 1/

1/ The stated policy does not apply in circumstances where the owner of the property has consented to forfeiture of the property, e.g., if the owner has agreed to forfeiture in connection with a plea agreement. Neither does it apply to the

(continued...)

III. Pre-Seizure Judicial Review Favored for Seizure of Personal Property. Whenever practicable, Department of Justice officials should obtain ex parte judicial approval prior to seizure of personalty. 2/

IV. Forms of Process To Be Used.

A. Warrant of Arrest In Rem

The historic form of process used to initiate civil judicial forfeiture of property is the verified complaint. The warrant of arrest in rem, normally filed with or after the filing of a verified complaint, gives the court jurisdiction over the property to be seized. It has not, however, historically included a judicial finding of probable cause.

Warrants of arrest in rem, as a general rule, must be served within the district of issue. However there is an exception provided by 21 U.S.C. 881(j) and 18 U.S.C. 981(h). Where either of these subsections are employed along with a separate warrant of seizure, some AUSAs and seizing agents may be unaware that, while these subsections permit the service of the warrant of arrest outside the judicial district of issue, the expanded venue does not apply to the warrant of seizure.

A form of warrant of arrest in rem has been developed which combines the historic form with a probable cause finding; see attached. As this combined warrant of arrest in rem and determination of probable cause accomplishes two purposes with one filing, it should be used for real property seizures as well as for seizures of personalty which can only be forfeited judicially. 3/

1/(...continued)
adoption for federal forfeiture of property previously seized by state or local law enforcement agencies.

2/ See Footnote 1, supra.

3/ In some districts, courts have reportedly been reluctant to review the attached form of combined warrant of arrest in rem and probable cause determination simply because they have not been used in the past. In such districts, the warrant of seizure may be used in concert with the traditional warrant of arrest in rem but the United States Attorney in each such district should meet with the Chief Judge to point out the advantages and propriety of the combined form of warrant of arrest in rem.

B. Warrant of Seizure

A second and newer form of process for seizing forfeitable property is the warrant of seizure authorized by 21 U.S.C. 881(b) and 18 U.S.C. 981(b)(2). This form of process secures a judicial determination of probable cause but does not confer jurisdiction upon the court issuing the warrant. Note that the Administrative Office of United States Courts will shortly issue a form of Warrant of Seizure and application therefor; copies of drafts of these new forms are attached. Once issued, these forms should be used for seizure of personalty which may be subject to administrative forfeiture.

V. Responsibility for Execution of Process. Generally, the U.S. Marshals Service has primary responsibility for execution of warrants of arrest in rem. Generally, the pertinent Department of Justice investigative agency has primary responsibility for execution of warrants of seizure.

VI. Practice and Procedure Points. Warrants of arrest in rem, as a general rule, must be served within the district of issue. However there is an exception provided by 21 U.S.C. 881(j) and 18 U.S.C. 981(h). Where either of these subsections are employed along with a separate warrant of seizure, some AUSAs and seizing agents may be unaware that, while these subsections permit the service of the warrant of arrest outside the judicial district of issue, the expanded venue does not apply to the warrant of seizure.

Where a district is employing 881(j) or 981(h) to arrest property outside the district, there are two remedies that can be employed. First, the U.S. Attorney's Office commencing the action may obtain the warrant of arrest and the U.S. Attorney's Office where the property is located may obtain the warrant of seizure.

A second approach is to have a judicial officer in the district commencing the forfeiture action sign the warrant of arrest in rem. This dispenses with the need for a separate warrant of seizure.

Attachments

CODE: WARRANT2.RE

UNITED STATES DISTRICT COURT

DISTRICT OF

UNITED STATES OF AMERICA,	:	
	:	
PLAINTIFF,	:	
	:	
V.	:	CIVIL NO.
	:	
ONE PARCEL OF PROPERTY LOCATED AT [1]	:	
	:	
, WITH ALL APPURTENANCES AND IMPROVEMENTS THEREON,	:	
	:	
DEFENDANT.	:	

WARRANT OF ARREST IN REM

To the United States Marshal for the District of :

WHEREAS, a verified complaint of forfeiture has been filed on [2], in the United States District Court for the District of , alleging that the real property and premises located at [3], with all appurtenances and improvements thereon, more specifically described in Exhibit A, attached hereto and fully incorporated herein by reference, [[4a] was used or intended to be used in any manner or part to commit or to facilitate the commission of a violation of Title II of the Controlled Substances Act, 21 U.S.C. §§ 801 et seq., punishable by more than one (1) year's imprisonment and is, therefore, subject to seizure and forfeiture to the United States pursuant to 21 U.S.C. § 881(a)(7).] [[4b] constitutes proceeds traceable to the exchange of controlled substances in violation of Title II of the Controlled Substances Act. 21 U.S.C. §§ 801 et seq.]

and is, therefore, subject to seizure and forfeiture to the United States pursuant to 21 U.S.C. § 881(a)(6).

And, the Court being satisfied that based on the verified complaint of forfeiture there is probable cause to believe that the real property and premises so described was so used or intended for such use, and that grounds for application for issuance of a seizure warrant exist, title having vested in the United States by operation of law;

YOU ARE, THEREFORE, HEREBY COMMANDED to arrest and seize said property, entering said property for the purpose of determining the physical condition of the property at the time of the seizure, and to maintain custody of said property as provided by 19 U.S.C. § 1605 until further order of this Court respecting the same. The United States Marshals Service shall use its discretion and whatever means appropriate to protect and maintain said defendant property.

YOU ARE FURTHER COMMANDED TO POST upon said real property in an open and visible manner notice of such seizure at the time thereof, making the government's seizure open and notorious;

AND FURTHER TO SERVE upon the record owner thereof a copy of this warrant in a manner consistent with the principles of service of process of an action in rem under the Supplemental Rules For Certain Admiralty and Maritime Claims, Federal Rules of Civil Procedure, within a reasonable time of seizure;

The United States Marshal shall have at his discretion the authority to dispose of, by any means available, perishable, contaminated, flammable, explosive, or violable items. An inventory

will be kept as to those items and the method of disposal.

[[5] All persons, animals, and property located within the premises and not subject to seizure pursuant to this Order shall be removed from the premises no later than Such removal shall be accomplished making due provisions for the rights of innocent parties.]

AND UPON APPLICATION of the plaintiff, United States of America, and pursuant to the All Writs Act, 28 U.S.C. § 1651(a), the Court shall issue any order necessary to effectuate and prevent the frustration of the execution of this warrant;

[[6] FURTHER, IT IS HEREBY ORDERED that the occupants of said real property and premises described in Exhibit A, if there be any, upon execution of this seizure warrant, acknowledge in writing the seizure of said property and service of this warrant, [7] and quit the premises no later than [8].]

It is further ORDERED that the owners and occupants of the defendant property not make any changes or improvements whatsoever to said property without the written consent of the United States Marshal.

[[9] The United States Marshal, at his discretion, shall be accompanied by federal, state, or local law enforcement officers to assist him in the execution of this Warrant.]

A RETURN of this warrant shall be promptly made to the Court identifying the individuals upon whom copies were served and the manner employed, and a statement as to the satisfaction of the orders herein issued.

All persons claiming an interest in said property shall file their claims within ten (10) days after the execution of the Warrant or notice of this seizure, whichever occurs first, pursuant to Rule C of the Supplemental Rules for Certain Admiralty and Maritime Claims, and shall serve and file their answers within twenty (20) days after the filing of the claim with the Office of the Clerk, United States District Court,

with a copy thereof sent to Assistant United States Attorney

Additional procedures and regulations regarding this forfeiture action are found at 19 U.S.C. §§ 1602-1619, and Title 21, Code of Federal Regulations (C.F.R.), Sections 1316.71-1316.81. All persons and entities who have an interest in the defendant property may, in addition to filing a claim or in lieu of the filing of a claim, submit a Petition for Remission or Mitigation of the forfeiture for a non-judicial determination of this action pursuant to 28 C.F.R. Part 9.

Dated this day of 19 .

UNITED STATES DISTRICT JUDGE

****
COMMENTS
****

Note that there is no "[ ]" to the right of the Civil Number on this form. Generally, this document is prepared and filed prior to this number being available.

This alternative warrant may be used in those districts where either policy or judicial decision requires an ex parte determination of probable cause before the issuance of a Rule C warrant for the arrest of real property. This warrant eliminates the need for a Writ of Entry For Inspection, Code: INSPECT.WRT, since it constitutes a court order authorizing the entry onto the property by the United States Marshal. It also eliminates the need for a motion for authorization for the appointment of a substitute custodian, since it specifically authorizes the United States Marshal to hire anyone necessary to assist him in the maintenance of the property.

[5 and 8] [Optional] These provisions can be extremely controversial and the decision to evict should in all instances be reserved by the United States Attorney and the United States Marshal based upon judicial and public climate weighed against the best interest of the case.

[6] A signed acknowledgement will eliminate subsequent issues of notice and may be used in support of an order to vacate the property.

[8] [Optional] to be used in conjunction with #5.

[9] [Optional] This has been added in response to the U.S. v. Ladson, 774 F.2d 436 (11th Cir. 1985) and U.S. v. Showalter, 858 F.2d 149 (3d Cir. 1988), decisions and provides explicit authority for the United States Marshal to be assisted in the execution of the warrant when, for example, there is a potential for violence or where numerous tenants need to be interviewed.

"Posting" the property. In a few instances it may not be advisable to make the seizure open and notorious, e.g., when the building is occupied solely by innocent tenants.

Where the seized property is vacant, you may want to include this paragraph:

If the property seized is vacant, or becomes vacant, the United States Marshal, or any of his agents, shall, in addition to an inspection, secure the premises and inventory the contents of the premises to the extent the United States Marshal deems appropriate, and take such action as the United States Marshal or his agents deem necessary to protect the personal property of the owner or the former tenants of the property.

Where it is anticipated that occupants of the seized property will request to remove their non-forfeitable personal property, you may want to include this paragraph:

> When the seizure of the real estate property includes the contents, the occupants will be given the opportunity to remove from the location all of their personal belongings. A Deputy United States Marshal will accompany the occupants during the collection and packing of these belongings to ensure that only personal articles are removed from the location and to provide security for government agents and other seized assets. After the identification, collection, and removal of the personal belongings by the occupants, the occupants shall depart the location pursuant to the Order to Vacate.

Where it would be desirable to rent or lease the seized property during the pendency of the forfeiture action, you may want to include this paragraph:

> The United States Marshals Service, or any of its authorized agents or designees, shall have at its discretion the authority to rent/lease any vacant seized properties. Continued vacancy may result in deterioration and a diminished value to said property. The rental or leasing shall help assure any claimants and the United States Marshals Service that the property's value and integrity shall be maintained in at least the same condition as existed at the time of seizure.

AO 108 (8/90) Affidavit for Seizure Warrant

United States District Court

DISTRICT OF

In the Matter of the Seizure of
(Address or brief description of property or premises to be seized)

APPLICATION AND AFFIDAVIT FOR SEIZURE WARRANT

CASE NUMBER:

I _____ being duly sworn depose and say:

I am a(n) _____ and have reason to believe
Official Title

that in the _____ District of _____
there is now certain property which is subject to forfeiture to the United States, namely (describe the property to be seized)

which is (state one or more bases for seizure under the United States Code)

concerning a violation of Title _____ United States Code, Section(s) _____
The facts to support a finding of Probable Cause for issuance of a Seizure Warrant are as follows:

Continued on the attached sheet and made a part hereof. ☐ Yes ☐ No

_____
Signature of Affiant

Sworn to before me, and subscribed in my presence

_____ at _____
Date City and State

_____ _____
Name and Title of Judicial Officer Signature of Judicial Officer

AO 109 (8/89) Seizure Warrant

United States District Court

DISTRICT OF

In the Matter of the Seizure of
(Address or brief description of property or premises to be seized)

SEIZURE WARRANT

CASE NUMBER:

TO: and any Authorized Officer of the United States

Affidavit(s) having been made before me by (Affiant) who has reason to

believe that in the District of there is now
certain property which is subject to forfeiture to the United States, namely (describe the property)
to be seized

I am satisfied that the affidavit(s) and any recorded testimony establish probable cause to believe that the property so described is subject to seizure and that grounds exist for the issuance of this seizure warrant.

YOU ARE HEREBY COMMANDED to seize within 10 days the property specified, serving this warrant and making the seizure (in the daytime—6:00 A.M. to 10:00 P.M.) (at any time in the day or night as I find reasonable cause has been established), leaving a copy of this warrant and receipt for the property seized, and prepare a written inventory of the property seized and promptly return this warrant to (U.S. Judge or Magistrate) as required by law.

Date and Time Issued at City and State

Name and Title of Judicial Officer Signature of Judicial Officer

AO 109 (8/89)
Seizure Warrant

RETURN

DATE WARRANT RECEIVED	DATE AND TIME WARRANT EXECUTED	COPY OF WARRANT AND RECEIPT FOR ITEMS LEFT WITH

INVENTORY MADE IN THE PRESENCE OF

INVENTORY OF PROPERTY SEIZED PURSUANT TO THE WARRANT

CERTIFICATION

I swear that this inventory is a true and detailed account of the property seized by me on the warrant.

_____

Subscribed, sworn to, and returned before me this date.

_____ _____
U.S. Judge or Magistrate Date

EXHIBIT
E

Office of the Attorney General
Washington, D. C. 20530

November 20, 1989

The Honorable Dan Quayle
President
United States Senate
Washington, D.C. 20510

Dear President Quayle:

By action of Congress a year ago in the Anti-Drug Abuse Act of 1988 (P.L. 106-690), it is my duty to develop and report to you on systems available for the "immediate and accurate" identification of felons who attempt to purchase firearms. Pursuant to this mandate, earlier this year I established a Task Force on Felon Identification in Firearms Sales consisting of representatives from all Department of Justice components with expertise in this area and from the Department of Treasury. The Task Force developed alternative policies which were made public on June 26, 1989. Following publication, comments were received from more than 100 organizations, including state and local government agencies. All of these were considered by the Task Force before it forwarded to me its final report (enclosed), dated October 22, 1989.

The goal of keeping firearms out of the hands of felons is deeply held by this Administration. It has long been my view that the first civil right of every American is to be free from fear of violent crime in our homes, our streets and our communities. While the Task Force review has been progressing, President Bush has proposed a detailed plan to combat violent crime, including the Comprehensive Violent Crime Control Act of 1989, submitted to Congress on June 15. This legislation would substantially strengthen federal law by closing the loopholes and enhancing penalties for those felons who use firearms in the commission of a crime. This legislation is a top priority of the President and this Department, and I urge swift approval of it. Putting felons in prison for long periods of time not only keeps them off the streets, but heightens the deterrent to others who might be tempted to use a firearm in the commission of a crime.

In its 127-page report, the Task Force identifies several major hurdles to achieving the goal of "immediate and accurate" identitification of felons seeking to legally purchase firearms. The greatest of these hurdles, as described in the introduction to the Task Force report, is the reality that felons obtain guns through many illegal, unlicensed means. There is an active "black market" in smuggled or stolen firearms. One study, performed for the National Institute of Justice, concluded that 84 percent of the incarcerated felons surveyed who admitted to owning firearms, had obtained them on the streets and not from licensed dealers.

A second obstacle to providing immediate and accurate identification of felons results from the current state of record-keeping by law enforcement agencies. No one list of felons exists. In addition, many of the criminal history records maintained by law enforcement are either out of date or incomplete, or both. Finally, current records often contain arrest information without a notation of the final disposition.

The third hurdle identified by the Task Force is a financial one. While the technology may exist to obtain "immediate and accurate" identification of those felons whose names are on computerized lists, the start-up costs of full and effective nationwide implementation of a system for the live scan of fingerprints at the point of sale could run as high as $27 billion. All other options entailed substantially lower, but nonetheless significant, costs.

Despite these problems, I believe we must be more aggressive in our efforts to keep firearms out of the hands of felons. Accordingly, I am forwarding a four-part recommendation for your consideration. These proposals, I believe, would enhance our efforts to stop sales to felons before they occur through on-the-spot computer review of criminal record files. While a comprehensive, accurate system for identifying felons at the point-of-sale simply cannot be fully accomplished in the near term, we must recognize it as a worthwhile goal to be accomplished over time. As the Task Force points out, under current technology and with the current status of criminal history records, a truly effective check would take at least one month. Such a delay would impose an unreasonable burden on legitimate gun purchasers, and therefore is unacceptable.

Therefore, I recommend implementation of Option A2 as presented in the Task Force report. It would provide for the use of a touch-tone telephone by licensed firearms dealers to contact a criminal justice agency for access to criminal records information currently on file with the states or the federal government. After a computerized check, the dealer would be notified if the intended purchaser has a criminal record. If a record exists, the sale could not go forward. In developing such a system, it will, of course, be necessary to take steps to protect the integrity of criminal records and to prevent abuse of these records. The Department will continue to review to what extent legislation will be necessary to implement fully this option.

Second, in order to make such a system feasible, I will direct the Federal Bureau of Investigation (FBI) to establish a complete and automated data base of felons who are prohibited from purchasing firearms. The Task Force estimates that only 40 to 60 percent of conviction records are currently automated. Establishment of a complete and automated data base would allow law enforcement to more easily identify felons and keep them from obtaining firearms. The lack of readily accessible conviction records is the greatest obstacle to an immediate and accurate felon identification system.

This data base cannot be created overnight. It will require significant effort and expenditure on the part of both the states and the FBI. To facilitate this effort, the FBI will develop, in conjunction with the Bureau of Justice Statistics (BJS), voluntary reporting standards for state and local law enforcement. Since the most urgent need is to identify criminals, these standards should emphasize enhanced record-keeping for all arrests and convictions made within the last five years and in the future.

To ensure that the standards take into account the burden placed on states, the FBI will issue draft standards for public comment within six months from the date of this directive. In addition, BJS will undertake a comprehensive study of state criminal history reporting systems to evaluate reporting accuracy and information retrieval capabilities. The initial phase of this study will be completed within six months. The study will be of great value to the states in enhancing their reporting systems and bringing them into compliance with the new FBI standards.

In addition, the Bureau of Justice Assistance will devote $9 million out of its Anti-Drug Abuse Act Discretionary Fund in each of the next three years to fund grants to states for purposes of state compliance with the new F.B.I. standards. States will be further urged to use other Federal law enforcement formula funds for this purpose.

Third, I will seek appropriate resources for the FBI to enhance its criminal history records system in order to merge the computerized index for an additional 8.8 million manual records into the FBI's automated identification system (AIS-III). This will significantly expand state access to criminal history records through the use of high speed telecommunications systems already in place. This system would be available both to help determine eligibility of firearms purchasers and for traditional law enforcement checks.

Fourth, the FBI will continue to monitor the impressive advances being made in biometric identification technology. These systems permit accurate identification of individuals based upon unique characteristics. Although use of such devices in every gun shop today would be prohibitively expensive, unworkable for most sellers, and inconvenient for prospective firearms purchasers, improvements in criminal history data bases and biometric technology may permit point-of-sale identification in gun shops within the foreseeable future. For example, one of the major impediments to the use of automated fingerprint identification equipment in gun shops today is the necessity to obtain ten fingerprints to make positive identification against data bases of more than 20 million arrestees. A targeted and more reliable data base may lend itself to verification based upon a single fingerprint which could be taken at much less inconvenience to buyer and seller and through use of equipment that costs a fraction of the cost of a ten-print system. A decision on whether to develop a comprehensive biometric system at point-of-sale should await further developments of technology.

Through the steps outlined above, I believe the federal government, working in cooperation with the states, can have an impact in reducing the availability of firearms to those who would bring violence to our neighborhoods. These steps, I

reiterate, will not solve this problem alone, but along with approval of the President's violent crime package, would address this matter in a responsible manner, without adversely affecting those who use firearms for legitimate sporting or hunting purposes.

Respectfully submitted,

Dick Thornburgh
Attorney General

cc: Members of the Senate

Enclosure (1)
"Report to the Attorney General on Systems for Identifying Felons Who Attempt to Purchase Firearms"

EXHIBIT
F

Office of the Attorney General
Washington, D. C. 20530

December 29, 1989

Honorable Joseph R. Biden, Jr.
Chairman, Judiciary Committee
United States Senate
221 Russell Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

During my testimony before the Senate Judiciary Committee on June 2, 1989, you raised questions with regard to my concerns over unauthorized disclosures of information relating to investigations of alleged criminal wrongdoing. As I told you then, I am extremely concerned that "these unauthorized disclosures not only threaten to compromise on-going investigations, but they give rise to the risk of focusing unwarranted public attention on persons who may not be guilty of any criminal wrongdoing." For these reasons, I have stated my determination that a vigorous investigation be undertaken whenever an unauthorized disclosure of this nature occurs.

You asked specificially that, upon completion, I share with you the results of and the methodology utilized in the Department's investigation of unauthorized disclosures of information which led CBS News reporter Rita Braver to air a story involving Congressman William H. Gray, III.

An exhaustive investigation into this matter has been concluded by the Department of Justice's Criminal Division and the Federal Bureau of Investigation (FBI). They reported to me that, because investigators were unable to identify with certainty the original source of the unauthorized disclosures to Ms. Braver and because the nature of the confirmations alleged to have been forthcoming to Ms. Braver are so uncertain, it would be futile and impossible to pursue a prosecution based on the available evidence. Therefore, I have accepted the recommendation of the investigators and prosecutors that this matter be closed without prosecution. Furthermore, since the investigation has not produced sufficient evidence to enable me to ascertain that any present employee of the Department of Justice was responsible for the disclosure, I have determined that no termination of employment or other disciplinary action is justified in this matter at this time.

As to the methodology which was applied, immediately following the Rita Braver report, I instructed the Criminal Division to conduct an investigation to locate the source of the unauthorized disclosures. The prosecutive team was supervised by Edward S.G. Dennis, Jr., Assistant Attorney General in charge of the Criminal Division, and was closely coordinated with Michael E. Shaheen, Director of the Office of Professional Responsibility. Two Criminal Division attorneys with a combined total of 25 years of experience comprised the prosecutive team.

A total of eleven FBI Special Agents participated in the investigation. Two investigative teams headed by FBI Inspectors devoted approximately 385 work days to this investigation. Interviews were conducted of members of the Philadelphia United States Attorney's office, the Philadelphia Division of the FBI, the FBI Headquarters, the Criminal Division, and my office. Approximately thirty other individuals were interviewed, including Members of Congress, Congressman Gray's employees, confidential sources, and a number of news reporters. Rita Braver declined to be interviewed or to otherwise cooperate in this investigation.

Signed, sworn statements were taken by investigators from all employees of the Department who were identified as having had pre-broadcast knowledge of the information about which Rita Braver reported. As the investigation progressed, additional signed, sworn statements were elicited from other individuals. In sum, 109 individuals provided signed, sworn statements concerning their knowledge of, and activity relating to, the information contained in the Braver report. Ten individuals from the Department (including the FBI) were asked to submit to polygraph examination. Investigators also gathered and analyzed numerous telephone records from the Department and the FBI to determine if contacts were made with Ms. Braver. In addition, several individuals testified before the Grand Jury impaneled in this matter.

Mr. Dennis concluded that it would be useful to have the prosecutors consult with the Office of Professional Responsibility throughout the investigation. It has been reported to me that the Office of Professional Responsibility has agreed with all of the Criminal Division's decisions regarding the investigation, as well as with the conclusions which they reached.

As the foregoing demonstrates, a comprehensive and thorough investigation was conducted. Unfortunately, the evidence derived from that investigation was not sufficient to support prosecution of the individual or individuals responsible for the unauthorized disclosure of information in this case or to occasion appropriate disciplinary action.

I trust this responds to the request which you made of me during the June 2 hearing.

Sincerely,

Dick Thornburgh
Attorney General

cc: Honorable Strom Thurmond

EXHIBIT G

Allocation of FBI Special Agents and Assistant United States Attorneys

FBI DIVISIONS	SPECIAL AGENTS	FBI A.T.*	ASSISTANT UNITED STATES ATTORNEYS
Anchorage	2	1	1 Alaska
Atlanta	3	1	2 ND Georgia 1 MD Georgia
Boston	3	1	2 Maine 1 New Hampshire
Chicago	4	2	3 ND Illinois
Cleveland	2	1	1 ND Ohio
Dallas	37	17	12 ND Texas 3 ED Texas
Denver	8	4	3 Colorado 1 Wyoming
El Paso	1		1 WD Texas
Houston	27	14	15 SD Texas
Kansas	10	5	3 Kansas 3 WD Missouri
Little Rock	4	2	2 ED Arkansas
Los Angeles	27	14	15 CD California
Memphis	1	1	1 WD Tennessee
Miami	4	3	2 SD Florida
Minneapolis	5	2	2 Minneapolis 1 North Dakota
Newark	3	3	1 New Jersey

New Orleans	12	5	3 ED Louisiana 2 MD Louisiana 2 WD Louisiana
New York	10	4	3 SD New York 3 ED New York
Oklahoma City	10	4	5 WD Oklahoma
Omaha	4	2	1 Nebraska 1 ND Indiana
Philadelphia	1	1	1 ED Pennsylvania
Phoenix	6	3	3 Arizona
Sacramento	1	1	1 ED California
San Antonio	8	4	5 WD Texas
San Francisco	4	3	3 ND California
Seattle	3	1	2 WD Washington
Tampa	1	1	1 MD Florida
Financial Crimes Unit, White Collar Crime Section, FBI HQ	1	—	—
TOTALS	143	100	112
			24 Criminal
Division (already assigned)	59		6 Tax Division 6 Reserve
TOTAL	202		148**

*FBI Accounting Technicians

** 20 auditors will be assigned to U.S. Attorneys

END

FILMED

10/05/92